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No. 15-___

In the Supreme Court of the United States

MARK J. SHERIFF, SARAH SHERIFF, WILES, BOYLE, BURKHOLDER & BRINGARDNER CO., LPA, AND MICHAEL DEWINE, ATTORNEY GENERAL OF OHIO,

Petitioners,

v.

PAMELA GILLIE AND HAZEL MEADOWS,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case asks whether Congress, through the Fair Debt Collection Practices Act, meant to interfere with the way in which a State engages in a sovereign function—its debt collection. Ohio requires its Attorney General to collect debts owed to the State. It authorizes the Attorney General to "appoint special counsel," in addition to employees, "to represent the state in connection with" this debt collection. The law requires that the Attorney General give special counsel the office's letterhead for use in collecting tax debts, and the Attorney General has read the law as giving him discretion over whether those counsel use that letterhead for other debts owed to the State.

The Fair Debt Collection Practices Act bars "debt collectors" from "us[ing] any false, deceptive, or misleading representation or means," 15 U.S.C. § 1692e, but expressly does not apply to "any officer or employee" of a "State to the extent that collecting or attempting to collect any debt is in the performance of his official duties," *id.* § 1692a(6)(C). In this case, a divided Sixth Circuit held that special counsel do not qualify for this state exemption and that a jury could find their use of state letterhead "misleading."

The case presents two questions:

1. Are special counsel—lawyers appointed by the Attorney General to undertake his duty to collect debts owed to the State—state "officers" within the meaning of 15 U.S.C. § 1692a(6)(C)?

2. Is it materially misleading under 15 U.S.C. § 1692e for special counsel to use Attorney General letterhead to convey that they are collecting debts owed to the State on behalf of the Attorney General?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Plaintiffs-Appellants below (and Respondents here) are Pamela Gillie and Hazel Meadows.

Defendants-Appellees below (and the Petitioners joining this Petition) are Mark J. Sheriff, Sarah Sheriff, and Wiles, Boyle, Burkholder & Bringardner Co., LPA. Defendant-Appellee Wiles, Boyle, Burkholder & Bringardner Co., LPA, has no parent company, and no publicly held company owns 10% or more of it.

Ohio Attorney General Michael DeWine (also a Petitioner joining this Petition) successfully moved to intervene in the district court as an Intervenor-Defendant, and was an Appellee in the Sixth Circuit.

Eric A. Jones and the Law Office of Eric A. Jones, LLC, were also Defendants-Appellees below.

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OPINIONS BELOW

The Sixth Circuit's denial of en banc review, Pet. App. 1a-17a, is unpublished. Its decision, Pet. App. 18a-76a, is reproduced at 785 F.3d 1091. The district court's decision, Pet. App. 77a-102a, is reproduced at 37 F. Supp. 3d 928.

JURISDICTION

On May 8, 2015, the Sixth Circuit issued its decision. On July 14, 2015, over the dissent of five judges, it denied petitions for rehearing en banc. This petition timely invokes the Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Fair Debt Collection Practices Act (the "Act"), Pub. L. No. 95-109, 91 Stat. 874 (1977), defines "debt collector" to exclude "any officer or employee of the United States or any State to the extent that collecting or attempting to collect any debt is in the performance of his official duties." 15 U.S.C. § 1692a(6)(C). It prohibits debt collectors from engaging in "any false, deceptive, or misleading representation or means in connection with the collection of any debt." *Id.* § 1692e. The appendix to this petition includes relevant sections of the Act and of Ohio law.

STATEMENT OF THE CASE

A. The States' Prerogatives Regarding Debts Have Long Been Viewed As An Important Aspect Of Their Sovereignty

"From the founding, the States have taken debts—whether owed by them or to them—seriously." Pet. App. 55a (Sutton, J., dissenting). As for debts owed *by* them, sovereign immunity has

granted States "the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith." *Principality of Monaco v. Mississippi*, 292 U.S. 313, 324 (1934); The Federalist No. 81, at 549 (J. Cooke ed. 1961). Less well known, States have also invoked their sovereign status as the ground for many privileges regarding debts owed *to* them.

As one example, "there has been no period, since the establishment of the English monarchy, when there has not been, by the law of the land, a summary method for the recovery of debts due to the crown " *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 277 (1856). Magna Carta took this prerogative as a given, demanding only that the crown seek goods ahead of lands. Magna Carta, ch. 8, in 1 E. Coke, *The Second Part of the Institutes of the Laws of England* 18 (1797). Similar debt-collection methods were replicated "in the laws of the various American colonies and, after independence, the States." *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 30 (1991) (Scalia, J., concurring in judgment); *Phillips v. Comm'r of Internal Revenue*, 283 U.S. 589, 595 & n.5 (1931). This Court upheld such procedures as applied against a U.S. revenue receiver. *Murray's Lessee*, 59 U.S. at 276-80.

As a second example, the crown viewed it as a sovereign "prerogative" to have its "debt paid before the debt of any subject." *Sir Edward Coke's Case*, 1 Godbolt 289, 290, 78 Eng. Rep. 169, 169-70 (Exch. 1653); 3 William Blackstone, *Commentaries on the Laws of England* 420 (1768). Most States "succeeded to [this] prerogative right" of priority under their common law. *U.S. Fid. & Guar. Co. v. Bramwell*,

217 P 332, 336 (Or. 1923); *Aetna Accident & Liab. Co. v. Miller*, 170 P. 760, 760-63 (Mont. 1918). "The Federal Government's claim to priority," by comparison, "rest[ed] as a matter of settled law only on statute." *United States v. Moore*, 423 U.S. 77, 81 (1975). This Court respected this state prerogative, finding it "enforceable against the property in the hands of a receiver appointed by a federal court." *Marshall v. New York*, 254 U.S. 380, 385 (1920).

As a third example, in perhaps the earliest use of the clear-statement rule, courts refused to interpret general bankruptcy laws as discharging debts owed to the crown. *Anon.*, 1 Atk. 262, 262, 26 Eng. Rep. 167, 167 (Ch. 1745); *Rex v. Pixley*, 1 Bun. 202, 202, 145 Eng. Rep. 647, 647 (Exch. 1726). States invoked the same rule—that the "sovereign" was not "named" and so "not bound"—when construing early bankruptcy laws as not discharging debts owed to them. *Commonwealth v. Hutchinson*, 10 Pa. 466, 468 (1849); *State v. Shelton*, 47 Conn. 400, 405-07 (1879); *Saunders v. Commonwealth*, 51 Va. 494, 496-98 (1853); *People v. Herkimer*, 4 Cow. 345, 348 (N.Y. Sup. Ct. 1825). This Court also followed that rule, noting that an intent to bind the United States must be "expressed in clear and unambiguous terms." *United States v. Herron*, 87 U.S. 251, 263 (1873). While bankruptcy laws now discharge some state debts, *Ohio v. Kovacs*, 469 U.S. 274, 278 (1985), this clear-statement rule lives on in the bankruptcy context, *Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 50-51 (2008); *Kelly v. Robinson*, 479 U.S. 36, 47-49 (1986).

The aspect of sovereignty at issue in this case is more basic, but no less important, than these tradi-

tional prerogatives. The case does not ask whether a State may seize property, *Murray's Lessee*, 59 U.S. at 276-80, demand payment first, *Marshall*, 254 U.S. at 384-85, or prevent a debt's discharge, *Herron*, 87 U.S. at 263. It asks only whether a State may *notify* debtors that they owe debts to the State and that the counsel collecting the debts acts on behalf of the State's chief debt collector—its Attorney General. Treating a State's sovereign interest in its debt-collection methods as a "policy concern," a divided Sixth Circuit held that special counsel for Ohio's Attorney General could not convey that they sent letters on behalf of the Attorney General without risking massive liability. Pet. App. 38a.

B. Ohio Has Long Delegated The Duty To Collect Debts To Its Attorney General

1. *Attorney General's Office Structure.* In 1846, Ohio passed a law "[t]o create the office of Attorney General, and to prescribe his duties." 44 Ohio Laws 45, 46 (1846). From then until now, the Attorney General has routinely relied on "special" counsel to fulfill many official duties.

During the 1800s, the Attorney General had one employee, but could hire "local counsel" to assist in civil actions. Revised Statutes of Ohio § 202 (1890); 73 Ohio Laws 189, 191 (1876). By the 1900s, Ohio authorized the Attorney General to have six employees, but again gave the Attorney General broad "power to employ special counsel." 97 Ohio Laws 59, 60 (1904). Only later did the Attorney General obtain authority to "appoint such employees as he may deem necessary." 107 Ohio Laws 503, 504 (1917).

Today, Ohio broadly authorizes the Attorney General both to hire employees, Ohio Rev. Code § 109.05, and to appoint special counsel to "represent the state in civil actions, criminal prosecutions, or other proceedings in which the state is a party or directly interested," *id.* § 109.07 Specific statutes also permit the Attorney General to appoint either assistant attorneys general or special counsel for particular matters. *See, e.g.*, *id.* §§ 109.81 (antitrust); 109.84 (workers compensation); 119.10 (administrative proceedings); 2743.14 (court of claims); *see id.* § 124.11(A)(11) (noting that assistant attorneys general and special counsel are in the "unclassified service" of the State).

2. *Debt-Collection Duties.* When Ohio created the office, it gave the Attorney General the power to sue those "owing debts to the state." 44 Ohio Laws at 47. The Attorney General retains this duty today. Ohio Rev. Code § 131.02(A)-(C). State debts can range from tax debts, to educational debts owed to state colleges, to medical debts owed to state hospitals. Doc.24, Counterclaim, PageID#300.

Ohio employs a three-step process to collect these varied debts. At step one, the relevant state entity attempts to collect for 45 days. Ohio Rev. Code § 131.02(A). At step two, the entity certifies the debt to the Attorney General. *Id.* At step three, if the Attorney General concludes that the debt has become an "uncollectible" or "final overdue claim," the State may release the debt or sell it to a private party. *Id.* §§ 131.02(F)(1), 131.022(B).

At the second step, once a debt has been certified, "[t]he attorney general shall give immediate notice by mail or otherwise to the party indebted of the na-

ture and amount of the indebtedness," and "collect the claim or secure a judgment and issue an execution for its collection." *Id.* § 131.02(B)(1), (C). The Attorney General undertakes these tasks through employees in the Collections Enforcement Section and special counsel. Since 1937, the office has been permitted to "appoint special counsel to represent the state" in connection with debts "certified to the attorney general," and to pay counsel out of the funds they recover. *Id.* § 109.08; 117 Ohio Laws 304, 304-05 (1937). This debt-collection duty requires significant effort. To put it in perspective, from July 2011 to June 2012, the office collected over $466 million in debts—$191 million of which came through special counsel. Doc. 24, Answer, PageID#306.

This case concerns special counsel's use of Attorney General letterhead when communicating with debtors. In 1989, Ohio passed a tax law "popularly referred to as the Ohio Taxpayers' Bill of Rights." Anthony L. Ehler and Randall A. Osipow, *Am. Sub. S.B. 147: Ohio Taxpayers' Bill of Rights*, 3.5 Ohio Tax Review 10, 10 (Sept./Oct. 1989). The law granted taxpayers certain rights against the State. 143 Ohio Laws 877, 879-86 (1989). As relevant here, one section directed the Attorney General to "provide to the special counsel appointed to represent the state in connection with [certain tax] claims the official letterhead stationery of the attorney general." *Id.* at 877 (codified at Ohio Rev. Code § 109.08). It *required* special counsel to "use the letterhead stationery, but only in connection with the collection of such claims arising out of those taxes." *Id.* The next section directed the Attorney General to appoint "problem resolution officers" to handle concerns from tax debtors about employees "or the special counsel assigned to

the case." *Id.* at 877-78 (codified at Ohio Rev. Code § 109.082).

The Attorney General has interpreted Ohio Revised Code § 109.08—that special counsel "shall" use the letterhead for tax debts, but only with respect to those debts—as requiring special counsel to use that letterhead for tax debts, and leaving it to the Attorney General to decide whether special counsel use that letterhead for other state debts. The Attorney General has likewise interpreted Ohio Revised Code § 109.082—that problem resolution officers "shall" handle tax-debt concerns—as requiring the Attorney General to appoint officers to handle tax complaints, but leaving it to the Attorney General to allow them to handle non-tax inquiries. Plaintiffs have "categorically den[ied]" challenging what the Attorney General's Office believes to be a longstanding view of state law. Doc.31, Answer, PageID#333; *cf. Cleveland State Univ. v. Mills*, No. 2007-01517, Pet. for Removal, Exh. (Ohio Ct. Cls. Jan. 19, 2007) (use of letterhead of former Attorney General Jim Petro), *available at* http://cases.ohiocourtofclaims.gov/cgi-bin/wspd_cgi.sh/streamfile.p?Serial=07011900106271 3&Seq=1.

3. *Contracts with Special Counsel.* During the relevant period, special counsel applied for one-year contracts with the Attorney General's Office. Doc. 48-12, Wiles Application, PageID#723-77. The contracts contained terms regarding special counsel's interactions with the Attorney General's Office and with debtors.

As for special counsel's relationship with the office, they were appointed "to provide legal services on behalf of the Attorney General to assist in the collec-

tion of past due debt." Doc. 48-8, Contract, PageID#635. They were independent contractors, not employees, and had to purchase their own insurance. *Id.*, PageID#635, 644. They also agreed to abide by public-records laws. *Id.*, PageID#637 (citing Ohio Rev. Code § 149.43). The Collections Enforcement Section assigned claims to special counsel. *Id.*, PageID#636. Before initiating litigation or settling, counsel agreed to obtain the office's approval. *Id.*, PageID#638. The office also retained the right to terminate special counsel at any time. *Id.*, PageID#642.

As for special counsel's dealings with debtors, the contracts required special counsel, "[i]n all pleadings, notices and/or correspondence," to make clear that the document was "prepared by the Special Counsel in its position as Special Counsel for the Attorney General." *Id.*, PageID#635. The Attorney General also "expect[ed] Special Counsel to provide services to the public in a manner that will preserve or enhance goodwill between the public and the State," and had "zero tolerance" for actions demonstrating "less than complete respect for the rights and reasonable expectations of the public." *Id.*, PageID#645-46. Special counsel had to follow "the same standards of behavior as set forth in" the Act. *Id.*, PageID#634, 646.

C. Plaintiffs Alleged That Special Counsel's Use Of State Letterhead Violated The Act, But The District Court Disagreed

1. For 2012 to 2013, the office appointed Mark Sheriff, an attorney with Wiles, Boyle, Burkholder & Bringardner Co., LPA, as one special counsel. Pet. App. 25a. In earlier years, Bruce Burkholder had been special counsel at Wiles. Doc.60-2, M. Sheriff

Aff., PageID#1080. In 2007, Burkholder filed suit against Plaintiff Hazel Meadows, a University of Akron graduate, to recover a debt owed to the university. *Id.* Meadows agreed in a judgment entry signed by her counsel to make monthly payments on this $4,500 debt. *Id.* Ex. B, PageID#1083. She made timely payments thereafter. Doc.60-1, S. Sheriff Aff., PageID#1077

In July 2012, Sarah Sheriff, a Wiles employee, remembers fielding a call from Meadows "ask[ing] [Sheriff] for her balance." *Id.*, Page ID#1078. Sheriff sent a letter identifying the balance. Pet. App. 17a. The letterhead identified the office's Collections Enforcement Section. *Id.* The body read: "Per your request, this is a letter with the current balance owed for your University of Akron loan that has been placed with the Ohio Attorney General. Feel free to contact me should you have further questions." *Id.* Sarah Sheriff signed the letter; under her name was the firm's name and address; under the address was the notation "Special Counsel to the Attorney General." *Id.* Because Sheriff was responding to Meadows, she did not think it mattered who signed the letter. Doc.60-1, S. Sheriff Aff., PageID#1078.

"Though the letter said it was in response to [Meadows's] request for information," Meadows asserted that she did not "recall ever asking anyone for any information about this matter." Doc.48-3, Meadows Aff., PageID#612. The letter allegedly "scared [her] because [she] thought that the Ohio Attorney General might charge [her] with a crime for not paying what he said [she] owed." *Id.*, PageID#613. She took the letter to her attorney, and says that she sought counseling for stress. *Id.*

2. The Attorney General appointed Defendant Eric Jones as special counsel for July 2011 to June 2012. Pet. App. 25a. On May 24, 2012, Jones sent Plaintiff Pamela Gillie a letter with Attorney General letterhead. Pet. App. 14a. The letter included a numerical "balance." Its body said: "You have chosen to ignore repeated attempts to resolving the referenced medical claim. If you cannot make immediate payment call Denise Hall at Eric A. Jones, L.L.C., at my office to make arrangement to pay this debt." *Id.* Jones signed the letter as "Outside Counsel for the Attorney General's Office." *Id.* His return address was listed on the bottom. *Id.*

Gillie alleged that she was confused why Jones sent a letter for the Attorney General, and thought it might be a scam because it asked to send money to a private firm. Doc.48-1, Gillie Aff., PageID#609. Having filed for bankruptcy, Gillie allegedly also feared that "the Attorney General might garnish my wages" or "somehow stop or delay my bankruptcy case." *Id.* Like Meadows, she contacted her attorney about the letter. *Id.*, PageID#610.

3. Plaintiffs brought a putative class action against Mark Sheriff, Sarah Sherriff, and Wiles, and Jones and his firm, alleging that the use of state letterhead violated 15 U.S.C. § 1692e. Doc.1, Compl., PageID#16-19. The complaint alleged that the Attorney General had assigned over $13 billion in debts to special counsel and that the class might expand to hundreds of thousands of debtors if Plaintiffs added additional counsel. *Id.*, PageID#12.

The Attorney General moved to intervene because the suit threatened his ability to retain qualified counsel. Doc.4, Mem., PageID#61. He also moved to

stay proceedings for a state case or to have initial issues immediately resolved. Doc.7, Mem., PageID#97 The district court granted the motion to intervene. Doc.23, Order, PageID#278. It bifurcated proceedings in response to the stay motion, deciding whether special counsel were "debt collectors" and whether the letterhead was misleading before all else. Doc.42, Order, PageID#480-83.

After both sides moved for summary judgment, the court ruled for Defendants. Pet. App. 78a. *First*, it found that special counsel were not debt collectors because they fell under 15 U.S.C. § 1692a(6)(C)'s exception for government "officers or employees." Pet. App. 84a-90a. The Dictionary Act defined "officer" as "'any person authorized by law to perform the duties of the office.'" Pet. App. 87a (quoting 1 U.S.C. § 1). This definition applied, the court found, because the Attorney General bore the duty to collect state debts, and a statute authorized special counsel to assist him in that duty. *Id.*

Second, the court found nothing "misleading" under 15 U.S.C. § 1692e about special counsel's use of state letterhead. Applying a "least-sophisticated consumer" test, it rejected the argument that the letterhead "misleads consumers as to the source of the debt collection letters and falsely implies that the letters are from the [Attorney General's Office] instead of special counsel and their law firms." Pet. App. 91a. The court noted that "[t]he letters accurately reflect [the] relationship" of special counsel to the Attorney General. Pet. App. 96a. It added that the letter from Sarah Sheriff required "additional analysis" because Mark Sheriff was special counsel. *Id.* Since the letter merely responded to an inquiry and was

not otherwise inaccurate, the court held, it was not "materially misleading." Pet. App. 97a.

D. A Divided Sixth Circuit Reversed

1. Rejecting the district court's two rationales, a split Sixth Circuit reversed for trial. Pet. App. 20a.

Starting with the state exemption, the majority held that special counsel met neither requirement for "officer" status under the definition requiring them to be "authorized by law" to perform "the duties of the office." Pet. App. 28a-44a. As for "authorized by law," the majority held that a contract, not a law, gave special counsel the authority to collect debts. While Ohio Revised Code § 109.08 authorized the Attorney General to appoint special counsel, the majority construed "authorized by law" to reach only laws immediately authorizing conduct without more. Pet. App. 31a. Alternatively, the court interpreted "duties of the office" to require an individual to be permitted to perform *all* duties, not just *one*. Pet. App. 35a.

The majority added three general points about the exemption. It cited cases holding that independent contractors were not "officers." Pet. App. 36a-38a. It rejected the dissent's reliance on the "clear-statement rule" applied in cases like *Gregory v. Ashcroft*, 501 U.S. 452 (1991), because "[t]his case is about third-party debt collectors" and "Ohio is not being regulated; nor is the structure of its government being challenged." Pet. App. 39a. And it stated that special counsel would not qualify as "officers" under various state laws. Pet. App. 39a-42a.

On the merits, the majority noted that the Act bars statements that have a "tendency to confuse the

least sophisticated consumer"—an "objective standard" with a "relatively low bar." Pet. App. 46a.

Under this standard, the majority held, a jury could conclude that special counsel's use of state letterhead was misleading. Pet. App. 48a-54a. "The presence of the authoritative symbols at the top of the letter immediately signals to the debtor that it is the State of Ohio that is threatening to take action against her." Pet. App. 49a. And while the signature clarified that the sender was an "outside" or "special" counsel to the Attorney General, "[t]he independent debt collector may have achieved his desired impact at the point when the letter is opened and the least sophisticated consumer perceives the name of the Attorney General." Pet. App. 50a.

2. Judge Sutton dissented on both grounds. The dissent noted that special counsel "fit" the "officer" definition "to a tee." Pet. App. 57a. A law authorized counsel to collect debts for the Attorney General, and debt collection was an official duty. *Id.* At the least, "officer" was ambiguous—as Plaintiffs conceded. Pet. App. 58a. That ended the matter: "When Congress purports to regulate core state functions, it must do so unambiguously." *Id.*

On the merits, the dissent found nothing misleading about special counsel's use of state letterhead. Pet. App. 63a-70a. "[S]pecial counsel are no different from assistant attorneys general paid to recover the State's money." Pet. App. 64a. Their use of Attorney General letterhead does not falsely imply that the letters came from the Attorney General because the "letters *do* come from the Attorney General." Pet. App. 65a.

3. The Sixth Circuit denied rehearing en banc. Pet. App. 1a. Judge Clay's concurrence noted that the letterhead could mislead debtors "into believing that [they were] being contacted directly by the attorney general's office rather than debt collection attorneys," which could intimidate them "into promptly paying the debt out of fear that that the attorney general might take punitive action against them." Pet. App. 3a. And because Congress meant to regulate independent debt collectors, special counsel fell outside the exemption. *Id.*

Judge Sutton—joined by Judges Boggs, Batchelder, Cook, and McKeague—made four points in dissent. Pet. App. 7a. *First*, he said that "[h]ow these letters could be misleading is beyond me" given that counsel sent the letters for the Attorney General. Pet. App. 8a. *Second*, he noted that "special counsel face potential liability coming and going" under the panel's decision because "recipients will assume that the letter does *not* concern a state debt" if counsel use private letterhead. Pet. App. 9a. *Third*, he reiterated that the "officer" exception applies because the case "implicates foundational federalism concerns." *Id.* *Fourth*, he concluded that Plaintiffs seek to have it both ways: For purposes of the exception, they find it clear that the letters do not come from the State; for purposes of liability, they "feign confusion." Pet. App. 10a.

REASONS FOR GRANTING THE PETITION

I. THE COURT SHOULD REVIEW WHETHER SPECIAL COUNSEL QUALIFY AS STATE "OFFICERS" UNDER 15 U.S.C. § 1692A(6)(C)

The Court should review the scope of 15 U.S.C. § 1692a(6)(C), which excludes from the Act's debt-collector definition "any officer or employee of the United States or any State to the extent that collecting or attempting to collect any debt is in the performance of his official duties." The Sixth Circuit's view that this text does not reach special counsel for Ohio's Attorney General conflicts with this Court's cases and with an analogous circuit case.

A. The Decision Below Conflicts With This Court's Cases

Because the Act does not define "officer," all agree it incorporates the general statutory definition: that "officer" "includes any person authorized by law to perform the duties of the office." 1 U.S.C. § 1. Special counsel satisfy this definition. One law gives the Attorney General the *duty* to collect debts owed to the State, Ohio Rev. Code § 131.02; another *authorizes* special counsel "to represent the state" in this duty, *id.* § 109.08. The Sixth Circuit's contrary view conflicts with two lines of this Court's cases: (1) those requiring Congress to speak clearly before intruding on state prerogatives, and (2) those interpreting 42 U.S.C. § 1983 not to draw sharp distinctions based on a defendant's employment status.

1. The decision below conflicts with this Court's clear-statement cases

a. "Among the background principles of construction that [the Court's] cases have recognized are

those grounded in the relationship between the Federal Government and the States under our Constitution." *Bond v. United States*, 134 S. Ct. 2077, 2088 (2014). Given our "'dual system of government,'" the Court refuses to read a federal law as "impinging upon important state interests" unless Congress speaks clearly. *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544 (1994) (citation omitted). By "resolv[ing] ambiguity in a federal statute" in favor of the States, *Bond*, 134 S. Ct. at 2090, this rule respects their "substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere," *Gregory*, 501 U.S. at 461.

This clear-statement rule is a mainstay of the Court's cases. The Court has invoked the rule to determine the breadth of specific federal laws, ranging from criminal laws, *Bond*, 134 S. Ct. at 2089-90, to employment laws, *Gregory*, 501 U.S. at 470, to bankruptcy laws, *BFP*, 511 U.S. at 544. It has also used the rule to create subsidiary canons cutting across the U.S. Code, including the presumption against preemption, *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 484 (1996), the rule that federal laws must clearly abrogate a State's sovereign immunity, *Dellmuth v. Muth*, 491 U.S. 223, 228 (1989), and the requirement that federal laws impose unambiguous conditions on a State's acceptance of federal funds, *Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1, 16-18 (1981).

b. The Sixth Circuit's refusal to apply the clear-statement rule conflicts with these cases. It rejected the rule because "Ohio is not being regulated; nor is the structure of its government being challenged."

Pet. App. 39a. This analysis was both mistaken and irrelevant.

The analysis was mistaken for two reasons. For one thing, debt collection qualifies as a central sovereign activity. As detailed above, *supra* at 1-3, States have always viewed their debt-collection prerogatives as arising from their sovereignty. Like taxation, *Piccadilly Cafeterias*, 554 U.S. at 51, or sovereign immunity, *Mississippi*, 292 U.S. at 325, debt collection concerns the public fisc—"the life blood of the state." *Am. Bonding Co. of Baltimore v. Reynolds*, 203 F. 356, 357 (D. Mont. 1913). Unsurprisingly, then, the clear-statement rule that the majority refused to apply may have gotten its start in this *very* context. *Shelton*, 47 Conn. at 404-05 (discussing history). If the rule applies anywhere, it applies here.

For another, in *any* context, the Court starts with the "assumption that federal legislation threatening to trench on the States' arrangements for conducting their own governments should be treated with great skepticism, and read in a way that preserves a State's chosen disposition of its own power." *Nixon v. Mo. Mun. League*, 541 U.S. 125, 140 (2004). A State's prerogative to choose between special counsel and employees is just as much a sovereign choice as is a State's prerogative to choose between state and local employees. *Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 437-39 (2002). Indeed, the Attorney General has had the general authority to hire special counsel *longer* than he has had the general authority to hire employees. *Compare* 97 Ohio Laws at 60, *with* 107 Ohio Laws at 504. Because the Sixth Circuit would treat special counsel differently from employees, its view "trench[es] on

[Ohio's] arrangement[] for" carrying out its duties. *Nixon*, 541 U.S. at 140.

Regardless, the majority's analysis was irrelevant. The clear-statement rule has *never* been limited to laws "regulat[ing]" a State or "challeng[ing]" "the structure of its government." Pet. App. 39a. Many cases apply the rule to laws not regulating the States *at all*. Most recently, *Bond* relied on the rule to interpret a federal criminal law as not covering a wife's attempt "to injure her husband's lover"—a far cry from a State's structure. 134 S. Ct. at 2083.

2. The decision below conflicts with the Court's § 1983 cases

a. The Court has interpreted § 1983 as implicitly incorporating common-law immunities that government officials historically asserted. *Imbler v. Pachtman*, 424 U.S. 409, 418 (1976). When determining the type of immunity to grant, the Court "rests on functional categories, not on the status of the defendant." *Briscoe v. LaHue*, 460 U.S. 325, 342 (1983). That is, "immunity flows not from rank or title or 'location within the Government,' but from the nature of the responsibilities of the individual official." *Cleavinger v. Saxner*, 474 U.S. 193, 201 (1985) (citation omitted).

Given this approach, the Court has held that a lawyer may seek qualified immunity under § 1983 even though he served a local government as a private contractor, not as a public employee. *Filarsky v. Delia*, 132 S. Ct. 1657, 1665 (2012). *Filarsky* recognized that government operations have long been accomplished by private citizens. *Id.* at 1662-65. And "examples of individuals receiving immunity for ac-

tions taken while engaged in public service on a temporary or occasional basis are as varied as the reach of government itself." *Id.* at 1665.

b. The Sixth Circuit's narrow reading of "officer" conflicts with *Filarsky*. As a general matter, the definition of "officer" dates to the time examined in *Filarsky*. The law that put this definition in its current home, 1 U.S.C. § 1, replaced a similar definition from 1871. Act of July 30, 1947, Pub. L. No. 80-278, § 2, 61 Stat. 633, 641; Act of Feb. 25, 1871, 41 Cong. ch. 71, § 2, 16 Stat. 431 (defining "officer" to "include any person authorized by law to perform the duties of such office"). It is unlikely that this definition excluded private contractors performing government duties given "the nature of government at the time." *Filarsky*, 132 S. Ct. at 1662. Courts recognized then that individuals appointed to temporarily undertake government duties, "for such time as in service, [were] officers of the law." *North Carolina v. Gosnell*, 74 F. 734, 738-39 (C.C.W.D.N.C. 1896).

Two historical examples that are relevant to the Act show that the Sixth Circuit's decision conflicts with *Filarsky*'s approach.

Example 1: The Act's legislative history identifies "marshals and sheriffs" as exempt officials. S. Rep. No. 95-382, at 3 (1977), 1977 U.S.C.C.A.N. 1695, 1698. But the duties of "sheriffs and constables" have long been performed by private parties. *Filarsky*, 132 S. Ct. at 1664. And it was established that private individuals who were "appointed special deputies, or officers, for the performance of a particular official duty" were "entitled to all the protection which the law affords to the regular officer." W. Murfree, *A Treatise on the Law of Sheriffs and Other*

Ministerial Officers § 83, p. 48 (1884); *Andrews v. State*, 78 Ala. 483, 485 (1885); *State v. Moore*, 39 Conn. 244, 250 (1872). Yet, under the Sixth Circuit's view, these "special" officers would nevertheless be subject to the Act. *Cf. Weiss v. Weinberger*, No. 2:04-cv-463, 2005 WL 1432190, at *4 (N.D. Ind. June 9, 2005) (holding that a court-appointed federal receiver was an "officer" under the Act).

Example 2: Since 1986, the Act has reached ordinary litigation activities of private attorneys. *See Heintz v. Jenkins*, 514 U.S. 291, 294-95 (1995). But governments have long used private attorneys for litigation. *Filarsky*, 132 S. Ct. at 1663-64. And it was established that private attorneys would be entitled to immunity when serving the government in that role. *Id.*; *White v. Polk Cnty.*, 17 Iowa 413, 414 (1864) (noting that "these necessary officers may be appointed, temporarily"). Yet, under the Sixth Circuit's view, the Congress that granted private counsel absolute immunity for alleged constitutional violations arising from litigation, *Imbler*, 424 U.S. at 427; *Cornejo v. Bell*, 592 F.3d 121, 127-28 (2d Cir. 2010), made them broadly face liability under the Act even in cases that arise from alleged "technical—but harmless—violations." *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 618 (2010) (Kennedy, J., dissenting).

* * *

If anything, this case is easier than *Filarsky*. The clear-statement rule led the Court to adopt § 1983's various immunities even though the "statute on its face does not provide for *any* immunities." *Malley v. Briggs*, 475 U.S. 335, 342 (1986). Here, however, Congress *did* adopt a broad exception for state ac-

tors. If a statute with *no* government immunities can be read to include an implied immunity for private actors performing government duties, a statute with a *capacious* government exception should be read to extend the exception to those same parties.

Congress itself believed so. It authorized the *U.S.* Attorney General to appoint private counsel to collect debts. 31 U.S.C. § 3718. When doing so, Congress found it necessary to state *expressly* that those attorneys were debt collectors under the Act, "[n]otwithstanding the fourth sentence of section 803(6)" (the sentence in the Act containing the various exceptions). *Id.* § 3718(b)(6). No similar clear statement exists for lawyers undertaking the sovereign state function of collecting debts for *State* Attorneys General.

B. The Decision Below Conflicts With An Analogous Circuit Case

1. "[T]he only circuit to confront an analogous governmental debt-collection practice has rejected" the Sixth Circuit's view. Pet. App. 69a (Sutton, J., dissenting) (citing *Heredia v. Green*, 667 F.2d 392 (3d Cir. 1981)). In *Heredia*, Landlord and Tenant Officers of the Philadelphia Municipal Court, acting at the request of landlords, regularly sent a "Municipal Court Notice of Termination of Lease" to tenants behind on their rent. 667 F.2d at 393. The notice demanded past-due rent and threatened eviction proceedings. *Id.* Tenants brought suit against one such officer, alleging that the notice "falsely" suggested that it had been sanctioned by the court. *Id.* at 396 (Stern, J., concurring).

The Third Circuit held that the officer fell within the exception because he was appointed by the court and "perform[ed] his duties pursuant to orders and instructions from the President Judge." *Id.* at 395. A concurring judge noted that it would be "anomalous" to expose the officer to "liability for deceptively giving the impression that he was acting as an officer of the court despite the fact that his actions had indeed been authorized by that court." *Id.* at 396 (Stern, J., concurring).

Identical logic applies here. As in *Heredia*, defendants were directed to send letters by a government actor. Pet. App. 56a. And, as in *Heredia*, plaintiffs alleged that identifying the government actor on the letters falsely represented the letters' connection to that actor. Pet. App. 55a. Indeed, the Act's exception makes more sense here. The officer in *Heredia* collected debts owed to *private* landlords, 667 F.2d at 393; the special counsel here collect debts owed to the *State*, Pet. App. 55a. In *Heredia*, moreover, no law identified debt collection as one of the officer's duties, 667 F.2d at 394-95; in this case, Ohio Revised Code § 109.08 identifies debt collection as special counsel's singular duty.

Relegating *Heredia* to a footnote, the Sixth Circuit responded: "Unlike special counsel, the Landlord and Tenant Officer position was prescribed duties by statute and the holder of the position was not in an independent contractual relationship for the purpose of collecting debts." Pet. App. 38a n.10. Yet the only duties *statutorily* prescribed for the officers were those "heretofore performed by constables" under Pennsylvania's Landlord and Tenant Act. 1970 Pa. Laws 2, 2. That act did *not* grant constables a

duty to send collection letters. *Heredia*, 667 F.2d at 394. Further, nowhere did *Heredia* mention whether the officers were employees or contractors, let alone hang its holding on that state-law distinction. *Id.* at 394-96. The constables they replaced had, in fact, been independent contractors paid fees for services. *In re Act 147 of 1990*, 598 A.2d 985, 986 (Pa. 1991). And the officers collected fees under the same Constable Fee Bill. *Heredia*, 667 F.2d at 396.

At bottom, whatever § 1692a(6)(C)'s scope, under no sensible reading should it exempt an individual authorized to collect *private* debts only by a *state official's decree*, but not an individual authorized to collect *government* debts by a *state law*. *Heredia* cannot be squared with the decision below.

2. While rejecting *Heredia*, the majority relied on two far-afield circuit cases. Pet. App. 36a-37a (citing *Brannan v. United Student Aid Funds, Inc.*, 94 F.3d 1260 (9th Cir. 1996); *Pollice v. Nat'l Tax Funding, L.P.*, 225 F.3d 379 (3d Cir. 2000)). In *Brannan*, a student loan was owed to a private bank. 94 F.3d at 1262. In *Pollice*, governmental entities sold claims arising out of taxes or water bills to a private entity. 225 F.3d at 385. Both thus involved debt collection for *private parties*. Here, however, all agree that the collection efforts concerned debts owed to the *State*.

II. The Court Should Review Whether The Use Of Attorney General Letterhead Was "Misleading" Under 15 U.S.C. § 1692e

The Court should also review whether special counsel's use of state letterhead is a "false, deceptive, or misleading representation or means." 15 U.S.C. § 1692e. Congress passed the Act almost four dec-

ades ago, but the Court has yet to review this principal provision. The lack of guidance has generated significant confusion in the circuits on a broadly recurring issue.

A. A Circuit Conflict Exists Over The General Liability Test Under § 1692e

A circuit split exists over the general test for analyzing whether a debt-collection method is "false, deceptive, or misleading." The "majority of the circuits" employ a "'least sophisticated debtor' or 'least sophisticated consumer' standard." *Gonzales v. Arrow Fin. Servs., LLC*, 660 F.3d 1055, 1061 n.2 (9th Cir. 2011); *Clomon v. Jackson*, 988 F.2d 1314, 1318 (2d Cir. 1993); *Lesher v. Law Offices of Mitchell N. Kay, PC*, 650 F.3d 993, 997 (3d Cir. 2011); *Russell v. Absolute Collection Servs., Inc.*, 763 F.3d 385, 394-95 (4th Cir. 2014); Pet. App. 48a; *Jeter v. Credit Bureau, Inc.*, 760 F.2d 1168, 1174-75 (11th Cir. 1985).

This test "is 'designed to protect consumers of below average sophistication or intelligence,' or those who are 'uninformed or naive,' particularly when those individuals are targeted by debt collectors." *Arrow Fin.*, 660 F.3d at 1062 (citation omitted). It is a "relatively low bar so as to cast [the Act's] protection over all consumers, even those who are 'gullible' or 'naïve.'" Pet. App. 46a. At the same time, its objective component supposedly "protects debt collectors against liability for bizarre or idiosyncratic interpretations of collection notices." *Clomon*, 988 F.2d at 1320.

On the split's other side, the Seventh Circuit "rejected the 'least sophisticated debtor' standard used by some other circuits." *Pettit v. Retrieval Masters*

Creditor Bureau, Inc., 211 F.3d 1057, 1060 (7th Cir. 2000). It did so because the least-sophisticated debtor is on "the very last rung on the sophistication ladder," one who "would likely not be able to read a collection notice with care (or at all), let alone interpret it in a reasonable fashion." *Gammon v. GC Servs. Ltd. P'ship*, 27 F.3d 1254, 1257 (7th Cir. 1994). The First and Eighth Circuits have since agreed. *Pollard v. Law Office of Mandy L. Spaulding*, 766 F.3d 98, 103 n.4 (1st Cir. 2014); *Peters v. Gen. Serv. Bureau, Inc.*, 277 F.3d 1051, 1055 (8th Cir. 2002).

These circuits have instead opted for an "unsophisticated consumer" test. *Gammon*, 27 F.3d at 1257. This hypothetical debtor "isn't a dimwit." *Wahl v. Midland Credit Mgmt., Inc.*, 556 F.3d 643, 645 (7th Cir. 2009). Rather, the debtor has "rudimentary knowledge about the financial world," is "capable of making basic logical deductions and inferences," and "reads collection letters carefully so as to be sure of their content." *Pettit*, 211 F.3d at 1060-61.

B. This General Conflict Manifests Itself In Procedural And Substantive Splits

Some cases have called the difference between these tests "de minimis." *Peter v. GC Servs. L.P.*, 310 F.3d 344, 348 n.1 (5th Cir. 2002); *Pollard*, 766 F.3d at 104 n.4. Both procedural rules and specific facts show that view to be mistaken.

1. Starting with procedural rules, the Seventh Circuit has said that its unsophisticated-debtor test requires a plaintiff to show that "'a *significant fraction* of the population'" would be misled. *Durkin v. Equifax Check Servs., Inc.*, 406 F.3d 410, 415 (7th

Cir. 2005) (emphasis added) (quoting *Pettit*, 211 F.3d at 1060)); *Williams v. OSI Educ. Servs., Inc.*, 505 F.3d 675, 678 (7th Cir. 2007). This requirement has led the court to strongly encourage plaintiffs to introduce consumer surveys that prove the misleading nature of the challenged letter—similar to the surveys used in trademark confusion cases. *McKinney v. Cadleway Props., Inc.*, 548 F.3d 496, 503 (7th Cir. 2008); *Sims v. GC Servs. L.P.*, 445 F.3d 959, 964 (7th Cir. 2006); *Durkin*, 406 F.3d at 419; *Taylor v. Cavalry Inv., L.L.C.*, 365 F.3d 572, 575 (7th Cir. 2004). In fact, "[s]uits under the [Act] have repeatedly come to grief" in the Seventh Circuit "because of flaws in the surveys conducted by the plaintiffs' experts." *DeKoven v. Plaza Assocs.*, 599 F.3d 578, 582 (7th Cir. 2010). Relatedly, the substantial-fraction requirement has led the Seventh Circuit to treat whether the challenged letter is misleading as a question of fact, not law. *Walker v. Nat'l Recovery, Inc.*, 200 F.3d 500, 503 (7th Cir. 1999).

The least-sophisticated-debtor circuits, by comparison, have not held that plaintiffs must show that the challenged letter would mislead a substantial fraction of the population. *Cf. Ellis v. Solomon & Solomon, P.C.*, 591 F.3d 130, 135 (2d Cir. 2010) (noting that the test is "designed to protect all consumers"). Nor have they required plaintiffs to introduce consumer surveys. *Cf. Gonzalez v. Kay*, 577 F.3d 600, 611 (5th Cir. 2009) (Jolly, J., dissenting) (criticizing survey requirement); *Johnson v. Revenue Mgmt. Corp.*, 169 F.3d 1057, 1063 (7th Cir. 1999) (Eschbach, J., concurring) ("I am also troubled by the majority's discussion of the use of survey evidence."). Instead, most of these circuits "disagree" with the Seventh and "think that whether a dunning letter is

confusing is always a matter of law" for the court. *Taylor*, 365 F.3d at 575; *Arrow Fin.*, 660 F.3d at 1061; *Russell*, 763 F.3d at 395. Far from a semantics game, these are real differences with real impacts.

2. A specific letterhead debate shows that the conflict has real consequences where, as here, the least-sophisticated-debtor courts *apply* that test to reach debtors with "'bizarre or idiosyncratic interpretation[s] of collection notices.'" *Lesher*, 650 F.3d at 1004 (Jordan, J., dissenting) (citation omitted). Beginning this debate, the Second Circuit held that a debt collector's use of law-firm letterhead did *not* misleadingly suggest that a lawyer had reviewed the debtor's account when the letter contained "a clear disclaimer explaining the limited extent" of lawyer involvement. *Greco v. Trauner, Cohen & Thomas, L.L.P.*, 412 F.3d 360, 365 (2d Cir. 2005).

Two circuits then issued fractured decisions holding that the use of law-firm letterhead *did* misleadingly imply lawyer involvement—even though the letter's *second* page indicated that no lawyer had reviewed the debt. *Lesher*, 650 F.3d at 1003; *Gonzalez*, 577 F.3d at 606-07. Each decision led to sharp dissents asserting that the courts had transformed the test into one asking whether someone with an "idiosyncratic" understanding can seek relief. *Lesher*, 650 F.3d at 1004 (Jordan, J., dissenting); *cf. Gonzalez*, 577 F.3d at 607 (Jolly, J., dissenting) ("I can only conclude that this collection letter conforms" to the least-sophisticated-debtor test and that "the majority creates a different but amorphous standard for the Fifth Circuit, effectively creating a circuit split"). It is hard to imagine a court applying the unsophisticated-debtor test as reaching the results in *Lesher*

and *Gonzalez* given that the test presumes that the debtor "reads collection letters carefully so as to be sure of their content." *Pettit*, 211 F.3d at 1061.

This case deepens this divide because the Sixth Circuit held that letterhead could be misleading even though—as in *Greco* but not *Gonzales* or *Lesher*—the information illustrating the debt collector's connection to the letterhead was on the *first* page. While each letter accurately indicated that it was sent by outside or special counsel for the Attorney General, the Sixth Circuit said, the debt collector "may have achieved his desired impact at the point when the letter is opened and the least sophisticated consumer perceives the name of the Attorney General." Pet. App. 50a. "[A]n accurate description by special counsel of their relation to the [Attorney General's Office]," the Sixth Circuit concluded, does not "preclude[] liability under the" Act. Pet. App. 53a.

The dissent found, by contrast, that only an *idiosyncratic* reader could somehow mistake the true message the letters convey: that these are debts owed to Ohio and that a "special counsel" or "outside counsel" acting on behalf of the Attorney General is collecting the debts. Pet. App. 66a-67a (Sutton, J., dissenting). Likewise, under the Seventh Circuit's approach, an unsophisticated debtor would undoubtedly make the "logical deduction" that these letters were coming from special counsel acting for, and with the approval of, the Attorney General. *Pettit*, 211 F.3d at 1060. But those would be correct deductions, not mistaken ones.

III. The Decision Below Resolves These Important Questions In A Far-Reaching Way

The Court should grant review because the two questions are important and the decision below resolved them in a troubling manner.

A. To begin with, both questions implicate our federalist structure. The clear-statement rule does not involve a mere "policy concern." Pet. App. 38a. It involves the "constitutional balance of federal and state powers." *Gregory*, 501 U.S. at 460. It reflects that "the Framers rejected the concept of a central government that would act upon and through the States, and instead designed a system in which the State and Federal Governments would exercise concurrent authority over the people." *Printz v. United States*, 521 U.S. 898, 919-20 (1997).

This divided government "'secures to citizens the liberties that derive from the diffusion of sovereign power.'" *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011) (citation omitted). Each State's communities may set local priorities free from "the political processes that control a remote central power." *Id.* Accordingly, liberty (not just structure) "is always at stake when" federal courts interpret federal laws to encroach on States. *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring).

This case proves the point. States have adopted diverse debt-collection methods. This diversity has generated studies proving the effectiveness of a centralized approach like Ohio's. Pet. App. 55a (Sutton, J., dissenting) (citing Nat'l Ass'n of State Auditors, Comptrollers, and Treasurers, *Government Debt Collection: Survey Report and Recommendations* 1-3

(2010), available at http://goo.gl/kO7GQ9). Local communities may find that approach superior in tough economic times to more and more tax increases or budget cuts.

The Sixth Circuit's resolution of these questions, however, undercuts the opportunities for experimentation. As for the first, the majority's rigid distinction between public employees and private contractors performing official duties places a thumb on the scale for bigger and bigger government. Yet States should not be discouraged to try novel methods, including private options where appropriate, to better serve constituencies. *Cf. Zelman v. Simmons-Harris*, 536 U.S. 639 (2002). As for the second, the majority's broad view of what counts as "misleading" condemns Ohio's choice to place debt-collection duties in its chief law-enforcement officer. The majority suggests that using the Attorney General to collect debts creates unlawful "leverage" under the Act, and that even assistant attorneys general escape liability *only* because they are exempt. Pet. App. 54a. Yet federal courts should not lightly critique a State's chosen division of its sovereign duties. "Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign." *Gregory*, 501 U.S. at 460.

B. In addition, the Court routinely grants review to "correct[] lower courts when they wrongly subject individual officers to liability" under § 1983. *City and Cnty. of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1774 n.3 (2015). This case raises the same, if not greater, concerns.

Qualified immunity, for example, "ensur[es] that talented candidates are not deterred from public ser-

vice." *Filarsky*, 132 S. Ct. at 1665. That is the reason the Attorney General intervened here. Doc.4, Mem., PageID#61. Talented debt collectors, like talented law enforcement, lead to more professional enforcement and fairer procedure.

Similarly, private individuals often "work in close coordination with public employees, and face threatened legal action for the same conduct." *Filarsky*, 132 S. Ct. at 1666. Here, for example, the Collections Enforcement Section works closely with special counsel. Doc. 48-8, Contract, PageID#636-38. "Assistant attorneys general 'frequently' help special counsel draft pleadings, and sometimes sign on as co-counsel when a 'particularly sensitive or complex' case demands it." Pet. App. 64a (Sutton, J., dissenting) (citation omitted). Accordingly, the majority's narrow view of the exception—when combined with its broad view of liability—could leave "those working alongside" public employees "holding the bag." *Filarsky*, 132 S. Ct. at 1666.

The maxim that "[a]n uncertain immunity is little better than no immunity at all" also applies here. *Id.* Parties working for the government need "reasonably to anticipate when their conduct may give rise to liability" under the Act just as much as under § 1983. *Anderson v. Creighton*, 483 U.S. 635, 646 (1987).

If anything, the concerns behind the Court's healthy qualified-immunity docket have heightened urgency in light of the Sixth Circuit's broad liability holding. Under § 1983, "no compensatory damages may be awarded absent proof of actual injury." *Farrar v. Hobby*, 506 U.S. 103, 112 (1992). Under the Act, however, plaintiffs can recover statutory

damages and attorney's fees *without* proof of actual injury. 15 U.S.C. § 1692k(a)(2). Not only that, the Act allows for a recovery even for good-faith misinterpretations of its ambiguous scope. *Jerman*, 559 U.S. at 577. The Act thus magnifies the risks for government actors and the disincentives to public service. *Cf. id.* at 612 (Kennedy, J., dissenting) (finding it problematic to authorize "class-action suits [that] transform technical legal violations into windfalls for plaintiffs or their attorneys").

C. The Sixth Circuit's exemption and liability holdings also leave special counsel in the dark on how to avoid protracted litigation. Special counsel could "face potential liability coming and going" because their use of *private* letterhead in response to the panel's decision might lead debtors to "assume that the letter does *not* concern a state debt." Pet. App. 9a (Sutton, J., dissenting). Yet, the dissent added, the "only thing misleading in this setting would be to suggest (through a law firm letterhead alone) that this *was not a state debt*." Pet. App. 68a. So the majority tells special counsel that their use of state letterhead could generate a lawsuit; the dissent tells them that switching to private letterhead could do so as well. What are special counsel to do?

The majority rejected the dissent's concern with private letterhead on the ground that the State has no "special authority that a regular creditor does not." Pet. App. 45a. Not so. If a debt has been certified to the Attorney General, a debtor's income-tax refund "may be applied in satisfaction." Ohio Rev. Code § 5747.12. That is not true of private debts. Unlike with a private creditor, moreover, statutes of limitation do not run against the State unless they

expressly say so. *Ohio Dep't. of Transp. v. Sullivan*, 38 Ohio St. 3d 137, 140 (1988); Ohio Rev. Code § 2329.07(A) (setting longer period for executing state judgments). Debts due the State also receive priority in probate. Ohio Rev. Code § 2117.25(A)(8). And the State Lottery Commission must use a debtor's lottery prize exceeding $5,000 to pay debts certified to the Attorney General. *Id.* § 3770.073(A). While the majority noted that private creditors may garnish lottery prizes, Pet. App. 45a, Ohio law gives that right only to creditors with a *final judgment* and only for prizes over *$100,000*; it also requires a new court order and places the debts in an inferior position. Ohio Rev. Code § 3770.07(D)(2)(b); Ohio Adm. Code 3770:1-8-01(B)(7). Given these differences, any debtor—from the most sophisticated to the least—would want to know that special counsel collect state debts on behalf of the Attorney General.

Even outside the state-debt context, others have expressed concerns with opaque "misleading" standards. Judge Easterbrook noted that the least-sophisticated-debtor test "either condemns *all* debt collection efforts (because some simpleton is bound to read the most fantastic things into ordinary language) or creates a system random in operation (because courts must be applying some other rule, which they have not communicated to debt collectors)." *Gammon*, 27 F.3d at 1259 (Easterbrook, J., concurring); *see also Lesher*, 650 F.3d at 1007 (Jordan, J., dissenting) (noting that the "practical effect" of the decision is that firms take "extraordinary risk in sending a collection letter [on firm letterhead], no matter how conciliatory").

D. Finally, the Sixth Circuit's holdings may not even help unsophisticated debtors (as compared to others). As noted by one judge who voted to hear this case en banc, the combination of vague liability standards with the absence of any need to prove a defendant's bad faith or a plaintiff's injury has "'enabled'" a sophisticated "'class of professional plaintiffs.'" *Fed. Home Loan Mortg. Corp. v. Lamar*, 503 F.3d 504, 513-14 (6th Cir. 2007) (Batchelder, J.) (citation omitted). Courts should be wary of turning the Act into a tool that "aligns the judicial system with those who would use litigation to enrich themselves at the expense of attorneys who strictly follow and adhere to professional and ethical standards." *Jerman*, 559 U.S. at 612 (Kennedy, J., dissenting).

As for the unsophisticated, Attorney General letterhead *does* identify special counsel's connection to the office and signals that debtors can call the office with concerns. The majority conceded that the letterhead has led debtors to do so. Pet. App. 48a-49a. This might have been one purpose behind the tax law that *required* the Attorney General to give the letterhead to special counsel for tax debts. Ohio Rev. Code § 109.08. That law's very next section created "problem resolution officers" to review complaints about special counsel. *Id.* § 109.082.

The Attorney General, it also bears noting, wears many hats. In addition to debt collection, the office oversees Ohio's Consumer Sales Practices Act. Ohio Rev. Code §§ 1345.05-.06. The office strives to balance consumer protection and fair collection. In that respect, whether or not special counsel are *statutorily* obligated to follow the Act, they are *contractually* obligated to follow its standards. Doc.48-8, Contract,

PageID#646. The Attorney General has "zero tolerance" for communications with debtors that show "less than complete respect for [their] rights." *Id.*, PageID#645-46. But if debtors remain in the dark about special counsel's connection to the office, they might not know to report real abuse.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 15-___

In the Supreme Court of the United States

MARK J. SHERIFF, SARAH SHERIFF, WILES, BOYLE, BURKHOLDER & BRINGARDNER CO., LPA, AND MICHAEL DEWINE, ATTORNEY GENERAL OF OHIO,

Petitioners,

v.

PAMELA GILLIE AND HAZEL MEADOWS,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX

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APPENDIX A

No. 14-3836

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PAMELA GILLIE, ET AL.,

Plaintiffs-Appellants,

v.

LAW OFFICE OF ERIC A. JONES, LLC, ET AL.,

Defendants-Appellees,

OHIO ATTORNEY GENERAL,

Intervenor-Appellee.

ORDER
Filed: July 14, 2015

BEFORE: CLAY, GILMAN, and SUTTON, Circuit Judges.

The court received two petitions for rehearing en banc. The original panel has reviewed the petitions for rehearing and concludes that the issue raised in the petitions were fully considered upon the original submission and decision on the cases. The petitions then were circulated to the full court. Less than a majority of the judges voted in favor of rehearing en banç.

Therefore, the petitions are denied.

ENTERED BY ORDER OF THE COURT

/s/ Deborah S. Hunt, Clerk

CLAY, Circuit Judge, concurring in the denial of rehearing en banc. I find that there is rarely a compelling reason to write separately in support of an order denying the rehearing of a case. This instance would be no different, but for the fact that my dissenting colleague has decided to elevate the importance of this matter far beyond its actual significance. Therefore, I offer these thoughts as a brief supplement to the prevailing view in this case, which was thoroughly set forth by the panel's majority opinion. *See Gillie v. Law Office of Eric A. Jones*, 785 F.3d 1091 (6th Cir. 2015).

The Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692 *et seq.*, prohibits "false, deceptive, or misleading" debt-collection practices. § 1692e. A particular practice that the FDCPA sought to extinguish was independent debt collectors "misrepresenting" that they were, in fact, "government official[s]." S. Rep. No. 95-382, at 8 (1977); *see also* 15 U.S.C. § 1692e(9). A debt collector need not work hard to run afoul of this prohibition—because the FDCPA is a prophylactic regulatory framework that imposes liability on any actions taken by an independent debt collector that tend to confuse the least sophisticated consumer. *Harvey v. Great Seneca Fin. Corp.*, 453 F.3d 324, 329 (6th Cir. 2006). This comprehensive standard of protection is meant to safeguard even those consumers that are "gullible" or "naïve." *Kistner v. Law Offices of Michael P. Margelefsky, LLC*, 518 F.3d 433, 438 (6th Cir. 2008). We have previously found that this broad base of protection is necessary because the least sophisticated consumer, once misled, "might feel pressured to immediately pay the

debt, even if she disputed its validity." *Barany-Snyder v. Weiner*, 539 F.3d 327, 334 (6th Cir. 2008) (internal quotation marks omitted).

By way of background, the Office of the Ohio Attorney General entered the marketplace and contracted for the services of private attorneys to collect consumer debts that were owed to State-owned entities, *e.g.*, the University of Akron. These private attorneys, acting as independent debt collectors, were paid exclusively from funds that they collected. These private attorneys, acting on behalf of the attorney general, have not been imbued with any powers that grant them access to unique debt-collection remedies that are otherwise unavailable to debt collectors working on behalf of private creditors, and that would justify automatically prioritizing the State's consumer debts that they were collecting above any other obligations that a debtor may have. Nonetheless, the Ohio Attorney General directed these private attorneys to use his letterhead (which is contrary to Ohio statutory law), in what seemingly was an attempt to intimidate debtors into promptly paying the debt out of fear that the attorney general might take punitive action against them. It is not difficult to fathom how the use of this letterhead could mislead the least sophisticated consumer into believing that he or she was being contacted directly by the attorney general's office rather than debt collection attorneys; and it is not difficult to understand why Congress sought to prevent independent debt collectors from misrepresenting their authority in this way.

My dissenting colleague ponders how this can be problematical when the private attorneys and the at-

torney general are in a principal-agent relationship. The answer is simple. Congress chose to regulate independent debt collectors, generally, irrespective of the clients that they have contracted with. This truth is unsurprising. Typically, a contractor is not exempted from otherwise applicable federal regulation simply because a state has entered the marketplace and chosen to purchase the contractor's services. Although the FDCPA does contain an express exemption for an "officer" or "employee" of a state so long as the collecting of debts falls within the scope of his or her official job duties, *see* 15 U.S.C. § 1692a(6)(C), the private attorneys acting as independent contractors in this case unmistakably fail to qualify for this exemption. *See Brannan v. United Student Aid Funds, Inc.*, 94 F.3d 1260, 1263 (9th Cir. 1996) ("This exemption applies only to an individual government official or employee who collects debts as part of his government employment responsibilities. [The contractor] is a private nonprofit organization with a government contract "); *Pollice v. Nat'l Tax Funding, L.P.*, 225 F.3d 379, 406 (3d Cir. 2000) ("The exemption expressly is limited to 'any officer or employee of the United States or any State' [And, it] does not extend to those who are merely in a contractual relationship with the government."); *see also Piper v. Portnoff Law Assocs.*, 274 F Supp. 2d 681, 688 (E.D. Pa. 2003) ("Because the defendants are in a contractual relationship with the City , the municipal officers' exemption does not extend to them."); *Gradisher v. Check Enforcement Unit, Inc.*, 133 F Supp. 2d 988, 992 (W.D. Mich. 2001) ("This Court agrees with *Brannan* and *Pollice* that an independent contractor is not entitled to an exemption to the FDCPA pursuant to 15 U.S.C. § 1692a(6)(C).");

Knight v. Schulman, 102 F. Supp. 2d 867, 876 (S.D. Ohio 1999) ("Since the Defendant was an attorney in private practice, rather than an officer or employee of the United States, he is not excluded from the definition of debt collector, regardless of whether the Defendant was acting as an agent of the United States at the time the letters were written.").

Representing that the government is directly attempting to collect the debt might mislead a naïve consumer into believing that the debt at issue must be prioritized above all other outstanding obligations, even when that is not actually the case. That deception, in turn, could cause debtors to make hasty debt-prioritization decisions and ultimately bring about the adverse effects Congress explicitly sought to eradicate when it enacted the FDCPA. *See* 15 U.S.C. § 1692 ("Abusive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs ").

My dissenting colleague contends that the debt collection notices in this case could only be potentially misleading if the private attorneys failed to indicate that they were working on behalf of the attorney general. That proposition is plainly wrong. The State client is only relevant inasmuch as the debt collection notice informs the debtor which debt the collector is actually seeking to collect. For example, presumably it was useful for Plaintiff Meadows to know that the letter was in reference to an outstanding balance for student loans with the University of Akron. It was also necessary for her to know the name and contact information of the private debt collection attorney who was seeking to collect the debt so that she could dispute or resolve that claim. On

the other hand, it was not pertinent or in any way helpful for her to know that the University of Akron had certified the debt to the Ohio Attorney General. That action had zero impact on her obligation to pay the debt. And that certification did not impact the private attorneys' ability to collect the debt. The mechanisms available to the private attorneys for obtaining payment were the same mechanisms that would have been at their disposal had the attorneys been collecting a debt on behalf of a private university or college.

Invoking the attorney general's name through the use of his letterhead could impermissibly mislead the least sophisticated consumer into believing that the letter came from the attorney general. For that reason, the Fifth Circuit has found that an independent debt collector working as an agent for the government violates the FDCPA simply by listing the government's return address on a debt collection envelope. See *Peter v. GC Servs. L.P.*, 310 F.3d 344, 352 (5th Cir. 2002). Deceiving the debtor into believing that the government entity is actually collecting the debt might unreasonably intimidate the debtor. Again, my dissenting colleague refuses to see the problem with this scenario because the government itself could have achieved this same intimidating impact. But that truth is entirely irrelevant. The FDCPA regulates independent debt collectors and their practices, not the states' officers and employees. It appears that my colleagues' true concern in this case is with the FDCPA itself and its failure to exempt from its provisions everyone who can be said to be operating in a principal-agent relationship with the government.

It is patently apparent that § 1692e(9) prohibits debt collectors from "falsely represent[ing]" that a communication is being "issued" by a government agent and from distributing a communication that "creates a false impression as to its source." The letters in question certainly could have led a naïve or gullible consumer into believing that they were sent directly by the Office of the Attorney General. It is also possible that the private attorneys could make it sufficiently clear in the signature block of their respective letters that they were neither government employees nor officers of the State. But it is not our job as judges on the federal Court of Appeals to presume what is or may not be confusing in every situation for the least sophisticated consumer. What Judge Sutton himself recently acknowledged in the *Buchanan* case, but now fails to recognize, is that "whether a letter is misleading raises a question of fact" for the jury. *Buchanan v. Northland Grp., Inc.*, 776 F.3d 393, 397 (6th Cir. 2015). For that very simple reason, there was nothing out of the ordinary or incorrect about the panel's decision to remand this case to the district court for resolution by the appropriate finder of fact.

SUTTON, Circuit Judge, dissenting from the denial of rehearing en banc joined by BOGGS, J., BATCHELDER, J., COOK, J., and MCKEAGUE, J.. Far be it from me to complain about my colleagues' unwillingness to hear a case en banc. As every federal judge learns before long, you can't always get what you want. And the en banc process, Fed. R. App. P 35(a), is not designed to eliminate that fixture of life on a collegial court. But there is something about this case that is difficult to let go.

The Fair Debt Collection Practices Act prohibits "false, deceptive, or misleading" debt-collection practices. 15 U.S.C. § 1692e. And it exempts State and federal "officer[s]" from its coverage "to the extent that collecting or attempting to collect any debt is in the performance of [their] official duties." 15 U.S.C. § 1692a(6)(C). At stake in this class action is the application of the Act to private law firms (known as "special counsel" in Ohio) hired by the State of Ohio's top legal official (the Ohio Attorney General) to collect debts on the State's behalf. A cognizable claim arises under the Act, our court holds, if a special counsel uses the Ohio Attorney General's letterhead in debt-collection letters sent to individual Ohio debtors. *See* Appendix (reprinting the two letters at issue in this case). What makes the two letters "misleading," says our court, is that debtors might get the impression "that a collection notice is being sent by a government actor." *Gillie v. Law Office of Eric A. Jones*, 785 F.3d 1091, 1105, 1109 (6th Cir. 2015). There are at least four problems with this theory that deserve correction by the full court.

First, there is nothing misleading about these letters. Special counsel act as the Attorney General's agents when they send out debt-collection letters on the State's behalf, and the letterhead accurately reflects that principal-agent relationship. The letterhead explains who the principal is: the Ohio Attorney General. And the signature line explains who the agent is: the private lawyer hired to collect the state debt. Making matters more perplexing, special counsel have no say in the matter: The Ohio Attorney General has directed all special counsel to use his letterhead when sending out debt-collection letters. How these letters could be misleading is beyond me.

Second, if letters on stationery that accurately reflect the principal-agent relationship are misleading under the Act, what are special counsel (or for that matter the Ohio Attorney General or for that matter other State Attorneys General) to do? If it is misleading to use the Ohio Attorney General's letterhead, isn't it also misleading to use private law firm letterhead on the same letters? For the use of private letterhead contains a potential risk of its own, indeed a greater risk: that recipients will assume that the letter does *not* concern a state debt. Under our court's decision, it seems to me, special counsel face potential liability coming and going. They may be held to account if they use state letterhead *and* if they don't. And that is so even when the Ohio Attorney General mandates—as a matter of state law—that they use his letterhead.

Third, as this discussion ought to suggest, the "officer" exemption to the Act applies, precluding federal courts from telling States what kinds of stationery to use on their debt-collection letters. All agree that, if the Ohio Attorney General had signed each of these letters, the "officer" exemption would apply. The same conclusion ought to apply, it seems to me, when the Attorney General's employees or special counsel sign the letters and accurately describe their relationship with the Attorney General—as occurred here.

Even if one thinks that the meaning of "officer" is unclear in this setting, the issue implicates foundational federalism concerns: how and when States collect and pay their debts. This core sovereign function is not the kind of thing that Congress typically regulates, and for that reason any ambiguity in the term

must be construed to protect (not infringe) state authority in the area. *See Gregory v. Ashcroft*, 501 U.S. 452, 460–61 (1991). "Congress," the Supreme Court has explained, "should make its intention clear and manifest if it intends to pre-empt the historic powers of the States." *Id.* at 460 (quotation omitted). There is no doubt that Ohio's enforcement of its civil code—by collecting money owed to it—constitutes a core sovereign function. *See Diamond v. Charles*, 476 U.S. 54, 65 (1986); *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 277 (1856); *cf. Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 440–41 (1793) (Iredell, J.). As a result, if we can plausibly interpret the word "officer" in two ways—one of which interferes with States' debt-collection practices and one of which does not—we must choose the latter. Because the plaintiffs in this case *conceded* that the word "officer" is ambiguous, *see* Reply Br. 5, they have done our work for us. Under *Gregory*, we must hold that special counsel are "officers" who are exempt from the Act's coverage.

Fourth, plaintiffs' theory of the case—theory as to why the debt-collection letters are misleading—highlights why the *Gregory* clear-statement rule applies. Recall what the plaintiffs claim is misleading about these letters—that the state-mandated letterhead suggests that the letters come from the Ohio Attorney General: an admitted "officer" of the State. The plaintiffs feign confusion about whether the letters came from the Attorney General—yet, when it comes time to interpret the word "officer," the plaintiffs find it quite evident that the letters did *not* come from the State.

For these reasons and those mentioned in my dissent from the panel decision, 785 F.3d at 1110, I respectfully dissent from the denial of rehearing en banc.

APPENDIX

[BOTH TEXT AND IMAGES OF LETTERS REPRODUCED HERE]

[Attorney General Mike DeWine letterhead]

EXHIBIT A1
May 24, 2012

Pamela Gillie 181355
2392 ROSECREST ST.
Grove City, OH 43123-8464

Reference: 8460030
Balance: $2227.46

Dear Sir/Madam,

You have chosen to ignore repeated attempts to resolving the referenced 8460030 medical claim. If you cannot make immediate full payment call DENISE HALL at Eric A. Jones, L.L.C., 614-545-9997 at my office to make arrangements to pay this debt.

THIS IS A COMMUNICATION FROM A DEBT COLLECTOR. THIS IS AN ATTEMPT TO COLLECT A DEBT. ALL INFORMATION OBTAINED WILL BE USED FOR THAT PURPOSE.

Sincerely,

/s/ Eric A. Jones

Eric A. Jones
Outside Counsel for the
Attorney General's Office
Telephone: 614-545-9998
Fax: 614-224-9300

RETURN THIS PORTION WITH YOUR PAYMENT

SEND PAYMENT TO:

Law Office of Eric A. Jones, L.L.C.
580 South High Street, Suite 100
Columbus, OH 43215

If paying by credit card, check box and please fill out below

[VISA] [MASTERCARD]

Card Number _____

V-Code__ (3 digit code on back of card) Exp. Date___

Amt. Paid_____

Print Name_____

Signature_____

MED3-1

Mike DeWine
Ohio Attorney General

EXHIBIT A1

May 24, 2012

Pamela Gillo 181353
2392 ROSECREST ST
Grove City, OH 43123-8464

Reference: 8460030
Balance: $2227.46

Dear Sir/Madam,

You have chosen to ignore repeated attempts to resolving the referenced 8460030 medical claim. If you cannot make immediate full payment call DENISE HALL at Eric A. Jones, L.L.C., 614-545-9997 at my office to make arrangements to pay this debt.

THIS IS A COMMUNICATION FROM A DEBT COLLECTOR. THIS IS AN ATTEMPT TO COLLECT A DEBT. ALL INFORMATION OBTAINED WILL BE USED FOR THAT PURPOSE.

Sincerely,

Eric A. Jones
Outside Counsel for the
Attorney General's Office
Telephone: 614-545-9998
Fax: 614-224-9300

RETURN THIS PORTION WITH YOUR PAYMENT

SEND PAYMENT TO:

Law Office of Eric A. Jones, L.L.C.
380 South High Street, Suite 100
Columbus, OH 43215

IF PAYING BY CREDIT CARD, CHECK BOX AND PLEASE FILL OUT BELOW

☐ VISA ☐ [redacted]

Card Number _____

V-Code _____ Exp. Date _____

Amt. Paid _____

Print Name _____

Signature _____

MED3-1

[Office of the Ohio Attorney General
Collections Enforcement Section letterhead]

EXHIBIT B1

July 20, 2012

HAZEL MEADOWS
587 SOUTH HARRIS AVENUE
COLUMBUS OH 43204

Re: STATE OF OHIO – UNIVERSITY OF AKRON
v. HAZEL MEADOWS
Amount of Claim: $2,581.07
*Our File No. 37430.001

Sir/Madam:

Per your request, this is a letter with the current balance owed for your University of Akron loan that has been placed with the Ohio Attorney General. Feel free to contact me at 614-221-2073 should you have any further questions.

Very truly yours,

/s/ Sarah Sheriff

Wiles, Boyle, Burkholder & Bringardner Co., LPA
300 Spruce Street
Columbus, Ohio 43215
Special County to the Attorney General for the State of Ohio

NOTICE – This is an attempt to collect a debt. Any information that we obtain will be used for that purpose. We will assume this debt to be valid unless you dispute the validity of all or any part of it within 30 days of receipt of this letter. If you notify us in writing you dispute all or part of the debt, we will obtain and send to you verification of the debt or a copy of

the judgment against you. Upon written request within 30 days after receipt of this notice, we will provide you with the name and address of the original creditor, if different from the creditor named above. We are debt collectors.

***IMPORTANT – PLEASE REFER TO OUR FILE NO. IN ALL COMMUNICATION**

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APPENDIX B

Recommended for full Text-Publication
Pursuant to Sixth Circuit I.O.P 32.1(b)
File Name: 15a0087p.06

No. 14-3836

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PAMELA GILLIE; HAZEL MEADOWS,

Plaintiffs-Appellants,

v.

LAW OFFICE OF ERIC A. JONES, LLC; ERIC A. JONES; WILES, BOYLE, BURKHOLDER & BRINGARDNER CO., LPA; MARK JEFFREY SHERIFF; SARAH SHERIFF,

Defendants-Appellees,

OHIO ATTORNEY GENERAL,

Intervenor-Appellee.

Appeal from the United States District Court
for the Southern District of Ohio at Columbus.
No. 2:13-cv-00212—James L. Graham, District Judge

Argued: March 3, 2015

Decided and Filed: May 8, 2015

Before: CLAY, GILMAN, and SUTTON, Circuit Judges.

COUNSEL

ARGUED: James E. Mobile, NOBILE & THOMPSON CO., L.P.A., Hilliard, Ohio, for Appellants. Christopher P Conomy, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Intervenor-Appellee. Boyd W Gentry, LAW OFFICE OF BOYD W GENTRY, LLC, Beavercreek, Ohio, for Jones Appellees. Michael L. Close, ISAAC WILES BURKHOLDER & TEETOR, Columbus, Ohio, for Appellees Wiles and Sheriff. **ON BRIEF**: James E. Nobile, Eric E. Willison, NOBILE & THOMPSON CO., LPA, Hilliard, Ohio, for Appellants. Christopher P Conomy, Sherry M. Phillips, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Intervenor-Appellee. Boyd W Gentry, LAW OFFICE OF BOYD W GENTRY, LLC, Beavercreek, Ohio, for Jones Appellees. Michael L. Close, Dale D. Cook, ISAAC WILES BURKHOLDER & TEETOR, Columbus, Ohio, for Appellees Wiles and Sheriff.

CLAY, J., delivered the opinion of the court in which GILMAN, J., joined. SUTTON, J. (pp. 25-37), delivered a separate dissenting opinion.

OPINION

CLAY, Circuit Judge. Plaintiffs Pamela Gillie and Hazel Meadows appeal the district court order entering summary judgment in favor of Defendants Eric A. Jones; the Law Office of Eric A. Jones, LLC ("Jones Law Office"); Mark J. Sheriff; Sarah Sheriff; and Wiles, Boyle, Burkholder & Bringardner Co., LPA ("Wiles Law Firm"). Plaintiffs brought this action under the Fair Debt Collection Practices Act

("FDCPA"), 15 U.S.C. § 1692 *et seq.*, alleging that Defendants utilized a deceptive, misleading, or false representation or means in attempting to collect consumer debts Plaintiffs owed to entities owned and operated by the State of Ohio. The Attorney General intervened on behalf of Defendants, asserting that the alleged misrepresentation—consisting of sending debt-collection notices on the Attorney General's letterhead—was not a misrepresentation at all and was, in fact, authorized by the Attorney General. The district court found that Defendants were exempt from FDCPA coverage as "officers" of the State of Ohio; and that, in any event, their use of the Attorney General's letterhead did not violate the FDCPA.

For the reasons set forth below, we **VACATE** the summary judgment in favor of Defendants and **REMAND** this case to the district court for further proceedings consistent with this opinion.

BACKGROUND

On September 20, 1977, Congress enacted the Fair Debt Collection Practices Act, Pub. L. 95-109, 91 Stat. 874 (codified at 15 U.S.C. 1692 *et seq.*), as Title VIII of the Consumer Credit Protection Act. Abusive debt collection practices were at the time, and remain today,[1] a "serious national problem" that

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1 *See* Press Release, FTC, New York Attorney General Crack Down on Abusive Debt Collectors (Feb. 26, 2015), available at https://www.ftc.gov/news-events/press-releases/2015/02/ftc-new-york-attorney-general-crackdown-abusive-debt-collectors; Rebecca Thiess & Ellen Taverna, *Cleaning Up Debt Collection: New rules are necessary to end abusive debt collection practices*, U.S. News (Mar. 24, 2014, 10:45 a.m. EDT), http://www.usnews.com/opinion/economic-

"touches the lives of many Americans." S. Rep. No. 95-382, at 2 (1977).[2] The FDCPA specifically sought to target all "third party" and "independent debt collectors," whom the Senate cited as "the prime source of egregious collection practices." *Id.* The Senate's contention was that independent debt collectors have little incentive to act fairly, given that they "are likely to have no future contact with the consumer and often are unconcerned with the consumer's opinion of them." *Id.* at 2. Moreover, the independent collector's commissions-based incentive to collect as many debts as possible is problematic, because it increases the likelihood of abusive collection practices. *Id.* The same concerns, however, are not present for "in house collectors," who were to be excluded from the FDCPA's broad definition of the term "debt collector." *Id.* at 3 (internal quotation marks omitted). "Government officials, such as marshals and sheriffs," were offered by the Senate as the lone example of "in house" collectors working in the public sector. *Id.* at 3. The statutory language ultimately adopted for this exemption excluded from the definition of debt collector, "any officer or employee of any State to the extent that collecting or attempting to collect any debt is in the performance of his official duties." 15 U.S.C. § 1692a(6)(C). This language remains the only exemption for state actors. The term "debt collector," from which these state actors are exempted, was ultimately defined as "any person who regularly collects or attempts to collect, directly or indirectly,

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intelligence/2014/03/24/the-consumer-protection-bureau-should-endabusive-debt-collection.

[2] This is the final committee report that was presented with the legislation before its enactment.

debts owed or due or asserted to be owed or due another." § 1692a(6). The overwhelming breadth of this provision is fitting, given Congress's intent to extinguish all abusive debt collection practices. One of these practices consisted of independent debt collectors "misrepresenting" that they were, in fact, "government official[s]." S. Rep. No. 95-382, at 8 (1977). This concern, along with the issue of who would qualify for the state sector exemption, are among the issues we address in this opinion.

Special Counsel and the Ohio Attorney General

Title I, Chapter 131, of the Ohio Revised Code governs the collection of debts[3] owed to the State of Ohio. These debts include unpaid taxes, overdue fees on governmental services, and administrative fines, as well as consumer debts arising from transactions with various State-owned entities (*e.g.*, overdue tuition from a State university or unpaid medical bills from a State hospital). This case is about consumer debts. Debts that remain uncollected by the State entity to whom the debt is owed are eventually "certified" to the Office of the Ohio Attorney General ("OAG"). Ohio Rev. Code § 131.02(A). The Attorney General is thereafter responsible for collecting the debt or disposing of it by other means (*e.g.*, securing a judgment, selling or transferring the claim on the debt, or causing the debt to be canceled). §§ 131.02(C), (F).

The Attorney General is not personally required to collect the debts certified to the OAG. Section 109.08

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[3] These debts are generally referred to as "claims" throughout the Ohio Revised Code.

of the Ohio Revised Code provides that the Attorney General may enlist "special counsel" to collect debts on the Attorney General's behalf. The statute reads in full:

> The attorney general may appoint special counsel to represent the state in connection with all claims of whatsoever nature which are certified to the attorney general for collection under any law or which the attorney general is authorized to collect.
>
> Such special counsel shall be paid for their services from funds collected by them in an amount approved by the attorney general.
>
> The attorney general shall provide to the special counsel appointed to represent the state in connection with claims arising out of [specific tax debts] the official letterhead stationery of the attorney general. The special counsel shall use the letterhead stationery, but only in connection with the collection of such claims arising out of those taxes.

Ohio Rev. Code § 109.08

Special counsel receive their appointment by submitting a successful response to a Request for Qualifications. Once selected, they enter into a "retention agreement" with the Attorney General that defines the scope of their engagement.

The retention agreement contains a few provisions that are germane to this dispute. First, actions taken by special counsel are only authorized by and through the retention agreement and only for its duration. (R. 48-8, 2013 Retention Agreement, PageID # 634 ("No services rendered by Special Counsel after

the date of Termination shall be authorized or payable without an additional agreement from the Attorney General."). Second, "Special Counsel shall be engaged by the Attorney General solely on an independent contractor basis." (*Id.* at PageID # 635 ("No Special Counsel shall be regarded as in the employment, or as an employee of, the Attorney General or the State Clients."). Third, "the appointment of Special Counsel is personal in nature and does not extend to any law firm that the Special Counsel is associated with." (*Id.* at PageID # 634). Fourth, claims are assigned to special counsel; however, all collections must be forwarded and endorsed by the Attorney General before the special counsel is entitled to receive a percentage of the collections-based fee. Fifth, the retention agreement requires special counsel to "comply with the same standards of behavior as set forth in the Fair Debt Collection Practices Act." (*Id.* at PageID # 646). In addition to these provisions, though not in the agreement, special counsel have been orally directed by the Attorney General to utilize OAG letterhead in connection with all collections (including consumer debts, even though it is contrary to Ohio's code[4]).

On April 13, 2012, the OAG announced a "Request for Qualifications for Special Counsel of Fiscal Year 2013" ("RFQ"). (R. 48-11, Jones Response to RFQ, PageID # 658). The RFQ solicited responses from qualified attorneys who wished to enter into a contract to perform debt collection on behalf of the state.

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[4] "The special counsel shall use the letterhead stationery, *but only in connection with* the collection of such claims arising out of those *taxes*." Ohio Rev. code § 109.08 (emphasis added).

The relationship would be "defined by contract" and the "appointment" would "only become effective upon execution of [the] Retention Agreement." (*Id.* at PageID # 661, 663).

Defendant Mark J. Sheriff submitted a response to the RFQ on May 1, 2012. Sheriff, a partner at Wiles Law Firm, had previously been appointed as a special counsel. Sarah Sheriff also worked for Defendant Wiles Law Firm at the time under the direction of Mark Sheriff. Defendant Eric A. Jones submitted a response to the RFQ on May 2, 2012. Jones, who owned and operated Defendant Jones Law Office, had likewise served as a special counsel in previous years. Sheriff and Jones became special counsel to the Attorney General for fiscal year 2013 upon the execution of the retention agreements they received, following their selection based on their respective responses to the RFQ.

On May 24, 2012, Plaintiff Pamela Gillie was engage in bankruptcy proceedings when she received a debt collection letter from Jones. The collection letter was written on OAG letterhead, which included both an image of the Great Seal of the State of Ohio and the Attorney General's name—Mike DeWine—in large font at the top of the page. The letter stated: "Dear Sir/Madam, You have chosen to ignore repeated attempts to resolving the referenced medical claim. If you cannot make immediate full payment call DENISE HALL at Eric A. Jones, L.L.C. at my office to make arrangements to pay this debt." (R. 48-2, Jones Collection Ltr., PageID # 611). The next paragraph of the letter continued in bold capital font, "THIS IS A COMMUNICATION FROM A DEBT COLLECTOR." (*Id.*) The signature block

read "Eric A. Jones Outside Counsel for the Attorney General's Office," and the return payment stub provided that payments should be made to the Law Office of Eric A. Jones, L.L.C. (*Id.* at PageID # 611 12). The notice did not specifically identify the original creditor or the date on which the debt was incurred. Gillie thought that it might have been related to her pregnancy. She believed that the letter was from the Attorney General but the inclusion of the other names confused her.

On July 20, 2012, Plaintiff Hazel Meadows received a debt collection letter from Sarah Sheriff with Wiles Law Firm. The letter used Office of the Attorney General letterhead for the "Collections Enforcement Section" and likewise included an image of Ohio's Great Seal. (R. 48-4, Wiles Collection Ltr., PageID # 614). The body of the letter read, "Sir/Madam: Per your request, this is a letter with the current balance owed for your University of Akron loan that has been placed with the Ohio Attorney General. Feel free to contact me should you have any further questions." (*Id.*) It was signed by Sarah Sheriff and the signature block noted her association with Wiles Law Firm and indicated that she was "Special Counsel to the Attorney General." (*Id.*) It was also noted in the letter that the sender was a debt collector. Meadows was confused by the letter and did not recall "ever asking anyone for information" about her debts. (R. 48-3, Meadows Affidavit, PageID # 612). Sarah Sheriff averred, however, that the letter was drafted in response to a phone call and that Meadows could not have been confused because she had previously made payment on the same debt after entering into an agreed judgment and payment plan on March 6, 2008.

Plaintiffs filed this suit on March 5, 2013, alleging that Defendants violated various provisions of the FDCPA by utilizing the OAG letterhead. The Attorney General thereafter successfully moved to intervene as Defendant and Counterclaimant. On September 6, 2013, the district court stayed discovery and ordered briefing to determine whether the issues of liability and damages should be bifurcated. Bifurcation was ordered on December 4, 2013, to delay a costly class-certification process until the court could decide the two legal issues presented: whether "special counsel" are debt collectors under the FDCPA and whether the use of letterhead from the Office of the Attorney General by special counsel violates the FDCPA. The district court also continued the stay of discovery and ordered the filing of dispositive motions within sixty days.

Plaintiffs and Defendants filed opposing motions for summary judgment and made appropriate responses. The Attorney General also moved for a judgment on the pleadings, and Plaintiffs moved to dismiss the Attorney General's counter-complaint for failure to state a claim. The district court granted Defendants' motions for summary judgment, denied the Attorney General's motion for judgment on the pleadings, denied Plaintiffs' motion for summary judgment, and denied as moot Plaintiffs' motion to dismiss for failure to state a claim. The court first held that special counsel are not "debt collectors" within the meaning of the FDCPA because they are officers of the State of Ohio, and state officers are explicitly exempted from FDCPA coverage. The court then went on to determine that, even if special counsel did fall within the definition of a "debt collector," use of OAG letterhead was not a "false, deceptive or

misleading" communication in violation of 15 U.S.C. § 1692e. This appeal followed.

DISCUSSION

Standard of Review

We review *de novo* an appeal from an order granting summary judgment. *Combs v. Int'l Ins. Co.*, 354 F.3d 568, 576 (6th Cir. 2004). Summary judgment should be granted when there exists no genuine dispute of material fact and, in light of the facts presented, the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P 56. The court may look to "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits" when ruling on the motion. *Id.* The facts must be viewed in the light most favorable to the non-moving party and all reasonable inferences shall be afforded to those facts. *Combs*, 354 F.3d at 576-77 But, a mere "scintilla of evidence" that militates against the clear weight of the evidence in the record does not create a genuine issue of fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

Analysis

I. "Debt Collectors" and the "Officer or Employee" Exemption

The FDCPA was enacted to prevent "abusive debt collection practices" and ensure that those debt collectors who fairly engage in the practice of debt collecting "are not competitively disadvantaged" by their peers' malfeasance. 15 U.S.C. § 1692. A "debt collector" is "any person who regularly collects or attempts to collect debts owed or due another" for profit. § 1692a(6). Any individual qualifying as an "officer or employee" of a state is excluded from

this definition if attempting to collect debts "in the performance of his official duties." § 1692a(6)(C).

The issue before us is controlled by the scope of the term "officer." Specifically, we must determine whether private attorneys "appointed" as "special counsel" to the Ohio Attorney General, but operating as independent contractors, are officers of a state, within the meaning of the FDCPA. We think not. The use of the word "appoint" in reference to "hiring" independent contractors is not decisive. Special counsel, in truth, are indistinguishable from the myriad of independent contractors who enter into for-profit agreements with government agencies or actors to help fulfill the duties of some government office. The FDCPA is a broad remedial statute, *Frey v. Gangwish*, 970 F.2d 1516, 1520 (1992), with limited, clearly defined exceptions. We find no justification for diluting its protection by broadly interpreting the term "officer or employee" to include independent contractors.

A. The Dictionary Act

When a statutory term is left undefined by Congress, we first turn to the Dictionary Act, which offers definitions for words that are commonly used throughout Acts of Congress. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2768 (2014). "Officer" is one of those words; and we must adhere to the Dictionary Act definition, "unless the context indicates otherwise." 1 U.S.C. § 1. Both sides insist that our judgment should be guided by extra-statutory considerations: Plaintiffs posit that we infer legislative intent as to the scope of the exclusion

by looking to principles of sovereign immunity;[5] whereas the Attorney General stresses the importance of federalism and a state's ability to determine the organization of its own government. "[T]he qualification 'unless the context indicates otherwise' has a real job to do, in excusing the court from forcing a square peg into a round hole." *Rowland v. Cal. Men's Colony, Unit II Men's Advisory Council*, 506 U.S. 194, 200 (1993). But we have not been stuck with a square peg. The Dictionary Act provides a specific definition for the present occasion that comports with our common understanding of the word "officer," and leads to a result that is consistent with the purpose of the FDCPA.

We review *de novo* the interpretation of statutory language. *RL BB Acquisition, LLC v. Bridgemill Commons Dev. Grp., LLC*, 754 F.3d 380, 384 (6th Cir. 2014). When the language of a statute is clear we must apply its plain meaning. *Ashland Hosp. Corp. v. Serv. Emps. Int'l Union, Dist. 1999*, 708 F.3d 737, 723 (6th Cir. 2013).

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[5] Debt collection companies that win government contracts pursuant to a statutory authorization are not entitled to sovereign immunity. *Rosario v. Am. Corrective Counseling Servs.*, 506 F.3d 1039 (11th Cir. 2007); *Del Campo v. Kennedy*, 517 F.3d 1070 (9th Cir. 2008). Special counsel, likewise, are not entitled to sovereign immunity because of their independent-contractor status and indemnification of the OAG. *See Brotherton v. Cleveland*, 173 F.3d 552, 560 (6th Cir. 1999) (listing four factors for the court to consider; indemnification being the most salient); *cf. Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 51 n.21 ("It would indeed heighten a mystery of legal evolution were we to spread an Eleventh Amendment cover over an agency that consumes no state revenues but contributes to the State's wealth." (internal quotation marks omitted)).

An "officer" "includes any person authorized by law to perform the duties of the office." 1 U.S.C. § 1. Defendants contend that "special counsel" easily fall within this definition by operation of the following Ohio statutes: § 109.08, authorizing the Attorney General to appoint special counsel to collect debts; and § 131.02, assigning the Attorney General responsibility over the collection of debts owed to the State. The difficulty with Defendants' arguments is that these statutes do not authorize special counsel to fulfill the duties of any office. Our focus is drawn to the following words: "authorized by law" and "the duties of the office." We consider each phrase in turn.

1. Authorized by Law

Although it is true that special counsel are authorized to collect certain debts assigned to them on behalf of the Attorney General, they are not authorized to do so by law. The Attorney General contends that § 109.08—bearing the title "special counsel to collect debts"—provides such an authorization. But this argument is specious. Our analysis must be guided by parsing the meat and bones of the statute, not simply by surveying its skin. Section 109.08, which is broken into four sentences, primarily governs the conduct of the Attorney General, and not that of special counsel. First, the statute authorizes the Attorney General to employ *or* contract with individuals selected by the Attorney General to act as special counsel for the purpose of collecting debts certified to the OAG. Second, it authorizes the Attorney General to set the pay of special counsel, which must be allocated only from funds that special counsel themselves have collected. Third, § 109.08 requires the Attorney

General to provide OAG letterhead to any special counsel assigned to collect specific tax debts. The fourth sentence, "The special counsel shall use the letterhead stationery, *but only in connection with* the collection of such claims arising out of those *taxes*," is the only provision of the statute that grants any authority to special counsel. Ohio Rev. Code § 109.08 (emphasis added). This provision not only fails to authorize any collections activity, it restricts the manner in which collections may occur should any collections actually be authorized or assigned by the Attorney General.[6] Section 109.08 simply establishes the framework under which the Attorney General, within his or her discretion, may delegate the collection of debts to a third-party debt collector. Authorization to actually act as an officer of a state requires more. Such an authorization entails the actual capability to act, not merely the prospect of a future delegation. *See Authorize* and *Authority*, BLACK'S LAW DICTIONARY (10th Ed. 2014) [hereinafter "BLACK'S"] (to authorize is "to give legal authority," which means "the power delegated by a principal to an agent").

We find no difficulty in determining the source of special counsel's authority. The RFQ emphasized that an appointment as special counsel would "only

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[6] The Attorney General's insistence that special counsel violate this restriction is the basis for this action. Taxes owed to a state are not debts under the FDCPA. The legislature's failure to specifically endorse the use of OAG letterhead by special counsel in the collection of consumer debts supports an inference that the state understood special counsel to be independent debt collectors and not entitled to use government letterhead.

become effective upon execution of a Retention Agreement," and that any relationship with the OAG would exclusively be "defined by contract." (R. 48-11, Jones Response to RFQ, PageID # 661, 663). The retention agreements themselves reiterated that "[s]pecial counsel shall be engaged by the Attorney General solely on an independent contractor basis." (R. 48-8, 2013 Retention Agreement, PageID # 635). Absent a contract *and* work being specifically assigned thereunder, "special counsel" is an empty title. Finding no authority derived from this title, we cannot say that special counsel are "authorized by law" to perform any duties. They are instead authorized only by contract with the OAG.

The Attorney General suggests that "a fair reading of 'authorized by law' means simply that it was lawful for the Attorney General to direct that [s]pecial [c]ounsel perform duties of the Attorney General's office." This interpretation is obviously flawed. The Attorney General has numerous duties, many of which are lawfully delegated by necessity to his staff at the OAG, not all of whom are officers. A narrower reading of the Attorney General's interpretation could be that only those delegations that are specifically contemplated by statute qualify as being authorized by law. However, as explained above, only an actual delegation (not one that is merely contemplated) falls within the ordinary meaning of the word "authorized." We are left only with the Attorney General's contracting authority to support the Attorney General's position. But the phrase "authorized by law" cannot be construed so as to include all duties and responsibilities entrusted by contract to an independent contractor. To hold otherwise would invite a preposterous result—bestowing officer status

under the Dictionary Act on every independent contractor working on behalf of a state.[7] This cannot be the case. "Interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available." *Guzman v. U.S. Dep't of Homeland Sec.*, 679 F.3d 425, 432 (6th Cir. 2012) (internal quotation marks omitted).

2. "The Duties" of the Office

Turning from "authorized by law," we find another reason to disqualify special counsel as officers under the plain meaning of the Dictionary Act. Mainly, that special counsel *do not* perform "the duties" of any office. The use of the definite article preceding both "duties" and "office" in the Dictionary Act's definition restricts our interpretation of that language. "[T]he word 'the' frequently (but not always) indicates 'a particular thing.'" *NLRB v. Noel Canning*, 573 U.S. ___, 134 S. Ct. 2550, 2561 (2014). It can also be used to refer to something generically, *id.*, as may be the case with "*the* office." By way of example, officers included any person authorized by law to perform the duties of the office *in question*—which

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[7] In Ohio, for example, the Facilities Construction Commission and its Executive Director are tasked with "general supervision over the construction of any projects, improvements, or public buildings constructed for a state agency." Ohio Rev. Code § 123.21(2). The Executive Director, like the Attorney General, is authorized by statute to engage independent contractors to undertake functions specifically prescribed by statute to his or her office. § 123.21(3). Under the Attorney General's interpretation of the Dictionary Act, every independent contractor working on a construction project for a state agency in the State of Ohio would be an officer of the state.

could be the Office of Attorney General *or* some other public office. However, the word "the" that precedes "duties" has only one sensible construction—that it refers to a specific thing—*all duties* associated with the office in question. It would be unreasonable to construe "the," in that instance, to mean "a," "some" or "any," *See, e.g., Sandifer v. U.S. Steel Corp.*, 134 s. Ct. 870, 876 (2014) ("It is a fundamental canon of statutory construction that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." (internal quotation marks omitted)); *Freeman v. Quicken Loans, Inc.*, 132 S. Ct. 2034, 2042 (2012) ("And it is normal usage that, in the absence of contrary indication, governs our interpretation of texts.").

Special counsel qualify as officers only if they are entitled to perform all duties of some public office.[8] But special counsel are not so entitled. Special counsel cannot perform all duties of the Attorney General's office; nor are they associated with any other public office.[9] A "public office" is "[a] position whose occupant has legal authority to exercise government's *sovereign powers* for a fixed period." *Public Office*, BLACK'S (emphasis added). The authority to collect consumer debts is not a sovereign power; instead, it is a right that can be exercised by any creditor. *See Sovereign Power*, BLACK'S ("The power to

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[8] This interpretation is also consistent with the common understanding of the term "officer." *See Officer*, BLACK'S ("In public affairs, the term refers esp. to a person holding public office under a national, state, or local government and authorized by that government to exercise some specific function.").

[9] The Attorney General has conceded that there is no legislatively designated office of special counsel.

make and enforce laws."); *Sovereign Right*, BLACK'S ("A unique right possessed by a state or its agencies that enables it to carry out its official functions for the public benefit, as distinguished from certain proprietary rights that it may possess like any other private person."). Without a legislatively designated office or the authority to exercise sovereign powers, special counsel are not officers of the State.

B. Officers, Appointment, and Independent Contractors, Generally

Even if the Dictionary Act were inapplicable to this case, our conclusion would be the same. The Attorney General has attributed special weight to the word "appoint," which it is not due. For reasons known only to the legislature, all of the Attorney General's employees are appointed. *See* Ohio Rev. Code § 109.05 ("The attorney general may *appoint* such employees as are necessary." (emphasis added)). Once we remove this guise as the basis for special counsel's authority, the resolution of this issue is readily apparent. The salient distinction between special counsel and the Attorney General's employees, who are also appointed, is special counsel's independent-contractor status. The overwhelming weight of authority sensibly finds that independent contractors are not exempt from FDCPA coverage as officer or employees, pursuant to 15 U.S.C. § 1692a(6)(C). *See, e.g.*, *Brannan v. United Student Aid Funds, Inc.*, 94 F.3d 1260, 1263 (9th Cir. 1996) ("This exemption applies only to an individual government official or employee who collects debts as part of his government employment responsibilities. [The contractor] is a private nonprofit organization with a government contract "); *Pollice v. Nat'l*

Tax Funding, L.P., 225 F.3d 379, 406 (3d Cir. 2000) ("The exemption expressly is limited to 'any officer or employee of the United States or any State' .[And, it] does not extend to those who are merely in a contractual relationship with the government."); *see also Piper v. Portnoff Law Assocs.*, 274 F. Supp. 2d 681, 688 (E.D. Pa. 2003) ("Because the defendants are in a contractual relationship with the City , the municipal officers' exemption does not extend to them."); *Gradisher v. Check Enforcement Unit, Inc.*, 133 F. Supp. 2d 988, 992 (W.D. Mich. 2001) ("This Court agrees with *Brannan* and *Pollice* that an independent contractor is not entitled to an exemption to the FDCPA pursuant to 15 U.S.C. § 1692a(6)(C)."); *Knight v. Schulman*, 102 F. Supp. 2d 867, 876 (S.D. Ohio 1999) ("Since the Defendant was an attorney in private practice, rather than an officer or employee of the United States, he is not excluded from the definition of debt collector, regardless of whether the Defendant was acting as an agent of the United States at the time the letters were written.").

Quite simply, "[t]he legal question raised is whether someone who has been appointed as special counsel to the attorney general is properly characterized as a state officer or employee or as an independent contractor." *Keefer v. Wiles, Boyle, Burkholder & Bringardner, Co., LPA*, Nos. 2:07-CV-1205, 2:07-CV-1288, 2008 WL 4404295, at *3 (S.D. Ohio Sept. 23, 2008) (emphasis added). The Attorney General has legally distanced himself and the OAG from special counsel so that the State of Ohio does not suffer the negative consequences of special counsel's actions. Now, he wishes to see that special counsel get treated as if they are officers of the State of Ohio, directly under his supervision. The Attorney General cannot

have it both ways; special counsel are not officers or employees simply because they *are* independent contractors. No court has held otherwise.[10]

C. Federalism and Policy Concerns

The Attorney General seeks to frame this case a matter of federalism, fundamentally insisting that Congress should have explicitly legislated that an independent contractor is incapable of being an "officer or employee" of the state. For legal authority, the Attorney General points to *Gregory v. Ashcroft* and the "plain statement" rule. *See* 501 U.S. 452, 460 (1991) ("If Congress intends to alter the usual

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[10] Defendants point to a few cases for support, but they are inapposite. In *Bell v. Newnham*, No. L-89-373, 1990 WL 131972, at *2 (Ohio Ct. App. Sept. 14, 1990), the Ohio Court of Appeals held that special counsel was "acting under color of [state] law" for the purposes of a § 1983 suit. The court relied on the fact that the plaintiff had sued special counsel "in his capacity as a state officer or employee," but the court never analyzed the validity of this assumption. Whether or not special counsel were "officers or employees" is insignificant in the § 1983 context, where it is widely accepted that independent contractors may act under color of law. *See Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 941 (1982) ("To act under color of law does not require that the accused be an officer of the State." (internal quotation marks omitted)). Similarly in *Berridge v. Heiser*, 993 F Supp. 1136, 1143 (S.D. Ohio 1997), the court found that special counsel could be sued under § 1983 if "acting under color of state law." Finally, in *Heredia v. Green*, 667 F.2d 392 (3d Cir. 1981), the Third Circuit found that the defendant was a state officer exempt from FDCPA coverage because he had been appointed a Landlord and Tenant Officer of the court. Like special counsel, the defendant was charged with serving debt notices. Unlike special counsel, the Landlord and Tenant Officer position was prescribed duties by statute and the holder of the position was not in an independent contractual relationship for the purpose of collecting debts. *See id.* at n.3.

constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." (internal quotation marks omitted)). This case is about third-party debt collectors. Ohio is not being regulated; nor is the structure of its government being challenged.

Contrary to Defendants' assertions, special counsel also fail to qualify as officers of the State under Ohio's own law. Section 109.36(A)(1) of the Ohio Revised Code defines an "[o]fficer or employee" as "[a] person who is serving in an elected or appointed office or position with the state or is employed by the state." Defendants conclude that special counsel must be officers because they are "appointed" pursuant to § 109.08 to a "position with the state." Again, the use of the word "appoint" is overstated. The Supreme Court of Ohio itself has recognized that courts should not "read so much into the word 'appointment' because the more significant words in [the statutory definition of 'officer or employee'] are 'office or position with the state.'" *Engel v. Univ. of Toledo Coll. of Med.*, 130 Ohio St. 3d 263, 267 ¶ 18 (2011).[11] The court elaborated by noting that a "public officer must possess some sovereign functions of government to be exercised by him for the benefit of the public either of an executive, legislative, or judicial character." *Id.* at ¶ 19 (internal quotation marks

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[11] Defendants attempt to distinguish this case because the use of the word "appointment" appeared in a letter as opposed to a statute (like § 109.08); however, they fail to recognize that the court specifically identified which words were most important in defining an officer of the state, pursuant to § 109.36(A)(1)—"office or position with the state."

omitted) (emphasis added); *accord Solowitch v. Bennett*, 456 N.E.2d 562, 566 (Ohio Ct. App. 1982) ("The chief and most decisive characteristic of a public office is determined by the quality of the duties with which the appointee is invested If official duties are prescribed by statute, and their performance involves the exercise of continuing independent, political or governmental functions, then the position is a public office." (internal quotation marks omitted)). Special counsel exercise neither "sovereign functions" nor "independent, political or governmental functions." Nor are they prescribed by statute any "powers and duties," as is common throughout the code.[12]

Another fair reading of Ohio's "officer or employee" statute is that only individuals "serving in an elected or appointed office" qualify as an officer, whereas those "serving in an appointed position with the state" are merely employees.[13] Special counsel

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[12] *See, e.g.*, Ohio Rev. Code § 109 (Attorney General's powers and duties); § 109.04 ("Powers and duties of first assistant attorney general"); § 109.75 ("Powers and duties of peace officer training commission executive director"); § 111.04 ("Duties of assistant secretary [of State]"); § 121.081 ("Department of insurance – powers and duties"); § 121.083 ("Superintendent of industrial compliance – powers and duties"); § 121.33 ("Office of Hispanic-Latino affairs – powers and duties"); § 121.42 ("Inspector general – powers and duties"); § 1155.011 (Superintendent and deputy superintendent for savings and loan associations and savings banks – powers and duties"); § 118.08 ("Powers, duties, and functions of financial planning and supervision commission"); § 120.04 ("State public defender – powers and duties"); § 120.15 ("County public defender – powers and duties").

[13] Special counsel has explicitly disclaimed the employee designation through contract.

necessarily fall into a third category. independent contractors, because it appears that the legislature failed to distinguish between "officers" and "employees" based on the presumption that all officers are, in fact, employees of the State of Ohio. This interpretation is consistent with another provision of the code, which presumes that every officer has a State-entity employer. *See* § 109.361 ("All expenses in the defense of an officer or employee shall be paid by the employer that employed the officer or employee at the time the alleged act or omission occurred."). However, the State is not special counsel's (nor any independent contractor's) employer.[14] *See Employer*, BLACK'S ("[O]ne who *controls and directs* a worker under an express or implied contract of hire and who pays the workers' salary or wages." (emphasis added)); *Independent Contractor*, BLACK'S ("Someone who is entrusted to undertake a specific project but *who is left free* to do the assigned work and to choose the method for accomplishing it *Unlike an employee*, an independent contractor who commits a wrong while carrying out the work usu[ally] does not create liability for the one who did the hiring." (emphasis added)).

If Special Counsel Defendants truly believed in their status as officers of the State of Ohio, then it begs the question why they are not now represented

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[14] The state could have said "paid by the *agency, office, or department* that employed," or used any other language that did not suggest a specific relationship between the officers and the entity that hired them. We must presume that the Ohio legislature used the words it chose with a full understanding of their common meaning. *Beverage Distribs., Inc. v. Miller Brewing Co.*, 690 F.3d 788, 794 (6th Cir. 2012).

by the Attorney General. *See* Ohio Rev. Code § 109.361 ("Upon the receipt of a written request by an officer or employee, the attorney general *shall* represent and defend the officer or employee in any civil action instituted against the officer or employee."). The answer is simple. Special counsel are not officers because they are independent contractors and not the holders of a public office. *See Advisory Opinion No. 75-016*, Ohio Ethics Commission (August 19, 1975).[15, 16]

If an actual officer or employee of the State of Ohio were collecting these debts, he or she would be exempt from FDCPA coverage. To the extent that this natural interpretation of an "officer of employee," which excludes independent contractors, restricts a state's ability to organize its government, Congress did make a plain statement about a state's right to

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[15] The Ohio Ethics Commission—an independent body responsible for ethics advice and enforcement with respect to the executive branch—was specifically asked to address whether special counsel were officers of the State of Ohio pursuant to § 109.36 to advise attorneys serving as special counsel if they were subject to a state prohibition against officers receiving outside income. The Committee noted that "[s]pecial counsel of the attorney general are not appointed to an office or an instrumentality of the state but are rather engaged as an agent of an elected officer of the state." *Advisory Op. No. 75-016*. Nor were they employed by the state because they "are independent contractors." *Id.*

[16] Defendants also point to § 124.11(A) (Unclassified service – classified service), which lists special counsel alongside of assistant attorneys general as unclassified civil servants. This categorization is meaningless, as it also includes teachers, library staff, nurses, and volunteer firefighters, among many others who are certainly not officers.

seek relief from FDCPA coverage: the Bureau of Consumer Financial Protection is *required* to exempt all "debt collection practices within any State" that are subject to "substantially similar" requirements as under the FDCPA. *See* 15 U.S.C. § 1692o. If special counsel were similarly situated to officers or employees of the State of Ohio, the Ohio Attorney General could have sought an exemption under this provision of the statute. *See* 12 C.F.R. § 1006.1 ("This subpart established procedures and criteria whereby states may apply to the Bureau for exemption of a class of debt collection practices with the applying state from the provisions of the [FDCPA].")

Notably, Congress did create an explicit exemption for certain private entities. *See* 15 U.S.C. § 1692p. The presence of this provision militates against the notion that Congress also intended to exempt independent contractors, generally, from FDCPA coverage without saying so. *See Corely v. United States*, 556 U.S. 303, 314 (2009) ("[A] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." (internal quotation marks omitted)). Congress did not include an exemption for independent contractors similarly situated to special counsel. We will not do so now.

Special counsel are, simply, as their contract with the Attorney General states, independent contractors. Independent contractors are not officers or employees under the plain language of the Dictionary Act. Nor are they officers of the State of Ohio simply because § 109.08 uses the word "appoint." Special counsel do not hold a public office; nor do they wield any sovereign power. The FDCPA specifically sought

to regulate independent debt collectors. Like any other independent debt collector, special counsel are paid only when they actually collect a debt. Congress explicitly referenced this incentive as contributing to the problems attendant with independent debt collectors. *See* S. Rep. No. 95-382, at 2 (1977) ("Collection agencies generally operate on commission, and this has too often created the incentive to collect by any means."). By finding tnat special counsel are subject to the FDCPA prohibitions, we are merely holding that Congress' intended target for regulation—independent debt collectors—are actually subject to the regulation.

II. False, Deceptive, or Misleading Acts and § 1692e Liability

Section 1692e states, "A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt." 15 U.S.C. § 1692e. This provision, along with its subsections, provides an "extraordinarily broad" base of protection to consumers, *Frey v. Gangwish*, 970 F.2d 1516, 1521 (6th Cir. 1992), and is intended to prevent all abusive debt collection practices by independent debt collectors that tend to deceive or mislead a consumer. *See* 15 U.S.C. § 1692 ("It is the purpose of [the FDCPA] to *eliminate* abusive debt collection practices " (emphasis added)). An inherent danger posed by harassing or deceptive collection practices is that consumers will be pressed into making uninformed decisions about debt prioritization, which affects their daily lives. *See* 15 U.S.C. § 1692 ("Abusive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs "). When the sender

of a letter misrepresents his or her authority, the least sophisticated consumer might reasonably be intimidated, confused, and "feel pressured to immediately pay the debt, even if she disputed its validity." *Barany-Snyder v. Weiner*, 539 F.3d 327, 334 (6th Cir. 2008) (internal quotation marks omitted).

Intimidation is at the heart of this case. There is no compelling reason for special counsel to use the OAG letterhead, other than to misrepresent their authority and place pressure on those individuals receiving the letters. The Attorney General insists that any sense of urgency (*i.e.* intimidation) that is created by the letters is permissible because the State has special authority that a regular creditor does not. This putative authority is not cited in any brief. The Attorney General mentioned at oral argument the power to garnish wages and to withhold lottery winnings. However, these powers are precisely those powers that are granted to *all creditors* after they have received a judgment against the debtor.[17] *See* Ohio Rev. Code § 2716 *et seq.* (allowing for garnishment of wages to judgment creditors); Ohio Admin. Code § 3770:1-8-01(B)(7) (allowing for garnishment of lottery prizes for judgment creditors). Presumably, it is the lack of extraordinary powers with respect to the collection of consumer debts that causes the Attorney General to seek out special counsel with "expertise" in "the securing of judgments" and "post-judgment collections." (R. 48-11, Jones RFQ

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[17] The Attorney General does have special powers with respect to tax debts, which are not at issue in this case. *See, e.g.*, Ohio Rev. Code § 3770.073 ("Satisfying debts to state from lottery prize awards"); § 3770.072 ("State income tax withholding and filing of report").

Response, PageID # 660); *see also* Ohio Rev. Code § 131.02(C) (listing the Attorney General's debt collection options: "The attorney general shall collect the claim *or secure a judgment* " (emphasis added)). The use of the letterhead has no apparent purpose beyond misleading a consumer into believing it is the Attorney General who is collecting on the account. But bad intentions do not result in liability under § 1692e; the debt collection practice must actually be deceptive.

The question before us, then, is whether an unsophisticated consumer could reasonably be misled into thinking she was being contacted by the Ohio Attorney General due to an independent contractor's use of OAG letterhead. If she could, we must also determine whether there is a genuine dispute of material fact as to any confusion that could be created by this debt collection practice under the particular circumstances of this case. Before we answer these questions, an overview of the liability provisions is necessary.

A. Liability Provisions

A debt collector violates § 1692e, put simply, if the collection practice that he uses has the tendency to confuse the least sophisticated consumer. *Harvey v. Great Seneca Fin. Corp.*, 453 F.3d 324, 329 (6th Cir. 2006). This is an objective standard, with a relatively low bar so as to cast FDCPA-protection over all consumers, even those who are "gullible" or "naive." *Kistner v. Law Offices of Michael P. Margelefsky, LLC*, 518 F.3d 433, 438 (6th Cir. 2008). However, because it is an objective standard, we will not sanction "liability for bizarre or idiosyncratic interpretations of collection notices." *Barany-Snyder*, 539 F.3d

at 333 (internal quotation marks omitted). Courts must consider the question of liability in light of the FDCPA's prevailing purpose—to prevent abusive, misleading, and deceptive debt collection practices.

In addition to the general liability provision, the FDCPA enumerates sixteen specific instances of conduct deemed to be *per se* violations of § 1692e. Plaintiffs rely on two of these provisions, §§ 1692e(9) and (14). "Without limiting the general application of the foregoing, the following conduct is a violation of [§ 1692e]":

> (9) The use or distribution of any written communication which simulates or is falsely represented to be a document authorized, issued, or approved by any court, official, or agency of the United States or any State, or which creates a false impression as to its source, authorization, or approval.
>
> (14) The use of any business, company, or organization name other than the true name of the debt collector's business, company, or organization.

15 U.S.C. §§ 16923(9), (14). Only material violations of the § 1692e prohibitions will result in liability.[18]

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[18] Plaintiffs suggest that materiality must be presumed under subsections (9) and (14) because those subsections describe misleading or deceptive means as opposed to false representations. This distinction is overstated. "Materiality is an ordinary element of *any* federal claim based on a false or misleading statement." *Miller v. Javitch, Block & Rathbone*, 561 F.3d 588, 596 (6th Cir. 2009) (internal quotation marks omitted) (emphasis added). Here, we are concerned whether the means—using OAG letterhead—is making the materially false statement that the letters were, in fact, sent by the Attorney General. Moreover, a materiality requirement is consistent with the legislative intent. *See* S. Rep. 95-382 ("[The FDCPA's] purpose is to pro-

Wallace v. Washington Mut. Bank, F.A., 683 F.3d 323, 326-27 (6th Cir. 2012). But materiality in the FDCPA context is no more than a restatement of the above-referenced standard: a false representation or act is material if it has the tendency to confuse the least sophisticated consumer. *Id.*

B. OAG Letterhead and the Least Sophisticated Consumer

We must decide, given the particular facts of this case and the words written in these letters, whether the least sophisticated consumer would be misled by the use of the OAG letterhead, *or*, if there is any genuine dispute of fact as to whether these letters were misleading. *See Wallace*, 683 F.3d at 326-27 Section 1692e(9) prohibits debt collectors from "simulat[ing]" official documents; from "falsely represent[ing]" that a communication is being "issued" by a government agent; and from distributing communications that "create[] a false impression as to its source." Subsection (14) prohibits the use of "any name other than the true name of the debt collector's business." It is clear that these provisions were violated in the technical sense—Mike DeWine is not the true name of any Defendant, Sarah Sheriff is not a special counsel, and the official letterhead certainly implied that the letter was issued by the OAG. But whether these misrepresentations are material requires further analysis.

Historically, special counsel's use of OAG letterhead has led to confusion. The Attorney General

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tect consumers from a host of unfair, harassing, and deceptive debt collection practices *without imposing unnecessary restrictions* on ethical debt collectors." (emphasis added)).

admitted to receiving phone calls from consumers asking whether the letters were authentic, and if the consumer did in fact woe a debt to the Attorney General. This revelation is unsurprising; many consumers might reasonably be unaware of Ohio's debt certification process and fail to understand why Ohio's chief law enforcement officer is attempting to collect from them. Receiving a bill from a state university, which the consumer actually attended, would naturally be perceived by an average consumer, to say nothing of a naïve or gullible one, as substantially different from receiving a collection letter written on OAG letterhead. The presence of the authoritative symbols at the top of the letter immediately signals to the debtor that it is the State of Ohio that is threatening to take action against her. If the consumer has been deceived, he or she may be overborn, and the precise type of abuse that the FDCPA sought to eradicate has been achieved.

The letter is not, however, the sole representation made by these letters. We must presume that Plaintiffs will read the entirety of the collection notice, with "a basic level of understanding and care." *Kistner*, 518 F.3d at 438-39. Both letters included clear indications that they were sent by an attorney who was acting as a debt collector. There was also some indication that the attorney's role as a debt collector was separate and apart from the OAG. Defendant Jones signed the letter directed to Gillie as "Outside Counsel for the Attorney General's Office." He also used his business address and informed Gillie to contact one of his employees at his law firm. Likewise, Defendant Sarah Sheriff signed the Meadows letter as both an employee of Wiles Law Firm and as special counsel. These representations may

clarify the confusing impact of the letterhead for the least sophisticated consumer, or they may be overshadowed by the larger presence of the Great Seal of Ohio and the Attorney General's name. The inclusion of the title "special counsel" in the signature block says nothing about a debt collector's relationship to the Attorney General; and the representation that a debt collector is acting as outside counsel working for a law firm does not preclude liability. *See Peter v. GC Servs. L.P.*, 310 F.3d 344, 352 (5th Cir. 2002) (finding a violation of § 1692e(14) where a debt collector used its true name in the letter while simultaneously directing the consumer to the government's return address). The independent debt collector may have achieved his desired impact at the point when the letter is opened and the least sophisticated consumer perceives the name of the Attorney General because the least sophisticated consumer may believe that "the price of poker has just gone up." *Avila v. Rubin*, 84 F.3d 222, 229 (7th Cir. 1996).

Both parties, and the court below, believe that summary judgment is appropriate one way or the other, but materiality is a mixed question of law and fact. *See United States v. Gaudin*, 515 U.S. 506, 521 (1995) ("It is commonplace for the same mixed question of law and fact to be assigned to the court for one purpose, and to the jury for another.") And, often "whether a letter is misleading raises a question of fact." *Buchanan v. Northland Grp., Inc.*, 776 F.3d 393, 397 (6th Cir. 2015). A letter that contains contradictory information or that tends to send a mixed signal is inherently confusing when it fails to include language that clarifies its meaning. *Miller v. Wolpoff & Abramson, L.L.P.*, 321 F.3d 292, 309 (6th Cir. 2003). Use of the letterhead, in our view, is intended

to induce a higher rate of repayment by intimating that the State of Ohio is in fact sending the letter, which may lead the naïve consumer to prioritize this debt above all others for no good reason. But intentions are not always realized and do not necessarily predict the impact of these letters on the least sophisticated consumer. It is not our role as judges to assert with certainty and without verifiable reason which individuals would or would not be misled by these letters. Therefore, we will not do so in this instance. Whether these letters did enough to clarify the initial confusion created by the use of the government letterhead is a question for the jury. *See, e.g.*, *Kistner*, 518 F.3d at 441; *Hartman v. Great Seneca Fin. Corp.*, 569 F.3d 606, 613 (6th Cir. 2009).

The Wiles Defendants suggest that Meadows could not reasonably have been confused because she had previously entered into an agreement to pay the debt in question and the letter was sent at her request. But this contention rings hollow,[19] and regardless, would not shield Defendants from liability because Meadows did not have to allege harm or actual confusion—the FDCPA is a "strict liability statute." *Fed. Home Loan Mrtg. Corp. v. Lamar*, 503 F.3d 504, 513 (6th Cir. 2007).

Defendants also seek shelter from potential liability by way of qualified immunity, which generally shields "government officials performing discretionary functions from civil damages liability as long as their actions could reasonably have been thought consistent with the rights they are alleged to have

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[19] The letter was generically addressed to "Sir/Madam."

violated."[20] *Anderson v. Creighton*, 483 U.S. 635, 638 (1987). But qualified immunity is inapplicable to an action brought directly under the FDCPA, where Congress has included an explicit exemption from debt collector liability for government officials. *Cf. Andrus v. Glove Const. Co.*, 446 U.S. 608, 616-17 (1980) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied. ").[21]

The Attorney General insists that no deception has occurred in this case because special counsel and the OAG are but one and the same. But they are not.[22]

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[20] Private individuals working on the behalf of the government may also seek the protection of qualified immunity, if offering such protection serves the public interest. *Filarsky v. Delia*, 132 S. Ct. 1657, 1665 (2012). But three of five Defendants—Wiles Law Firm, Jones Law Office, and Sarah Sheriff—had no relationship with the government. *See* (R. 48-8, 2013 Retention Agreement, PageID # 634) ("[T]he appointment of Special Counsel is personal in nature and does not extend to any law firm that Special Counsel is associated with.").

[21] Qualified immunity typically applies to actions brought under § 1983 or pursuant to *Bivens*. We have only extended its coverage to actions brought directly under a federal statute on a few occasions, *see, e.g.*, *Cullinan v. Abramson*, 128 F.3d 301, 312 (6th Cir. 1997) (RICO); *Blake v. Wright*, 179 F.3d 1003, 1011-12 (6th Cir. 1999) (Federal Wiretap Act), and those statutes did not include explicit exemptions for public officials.

[22] *See, e.g.*, (R. 48-8, Retention Agreement, PageID # 634–35) ("No Special Counsel shall be regarded as in the employment of, or as an employee of, the Attorney General or the State Clients"; "Special counsel shall be engaged by the Attorney General solely on an independent contractor basis"; "Special Counsel shall, at its own expense, procure and maintain, during the term of this Agreement, malpractice insurance"; "Special Counsel agrees to indemnify and to hold the Attorney General and the State of Ohio harmless and immune from any and all

The contractual relationship between special counsel and the Attorney General is no different than the relationship between any private, for profit debt collector and the creditors he or she serves. And neither a contractual relationship, nor any power of agency, nor an accurate description by special counsel of their relation to the OAG, precludes liability under the FDCPA. *See Knight v. Schulman*, 102 F. Supp. 2d 867, 876 (S.D. Ohio 1999) ("[R]egardless of whether the Defendant was acting as an agent of the United States at the time the letters were written," the FDCPA applied "[s]ince [he] was an attorney in private practice, rather than an officer or employee of the United States."); *see also McMillan v. Collection Profs., Inc.*, 455 F.3d 754, 761 (7th Cir. 2006) ("[I]n some cases the literal truth may convey a misleading impression.") (internal quotation marks omitted)); *Gradisher v. Check Enforcement Unit, Inc.*, 210 F. Supp. 2d 907, 914 (W.D. Mich. 2002) ("The fact that [the defendant] had an 'affiliation' with the [government] is thus irrelevant because [the defendant's] notices created the false impression that the notices were generated by the [government].").

Special counsel had an affirmative duty as debt collectors to abide by the provisions of the FDCPA. The FDCPA prohibits, as a *per se* deception, the false implication that a collection notice is being sent by a government actor. This deception may inappropriately influence a consumer's decisions by inducing prompt payment, regardless of the debtor's circum-

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claims for injury or damages arising from this Retention Agreement that are attributable to Special Counsel's own actions or omissions or those of his/her partners, associates ").

stances or the accuracy of the alleged indebtedness. That an OAG employee could attain the same leverage against the alleged debtor is not at issue in this case—employees and officers of a state are exempt from the FDCPA. Whether or not the use of the letterhead by special counsel was compelled by the OAG, a jury could reasonably find that special counsel's use of the letterhead is confusing; and therefore a violation of § 1692e, as a materially false, deceptive and misleading practice. We recognize the importance of a state's ability to collect on its own accounts, but once it has assigned debts to an independent, third-party debt collector, the federal rules apply. That is what happened in this case. And special counsel are liable if a jury finds that they have held themselves out as something they are not.

CONCLUSION

Because a jury could reasonably find that the use of the Ohio Attorney General's letterhead by the "special counsel" acting as independent debt collectors, in the manner and under the circumstances present here, to result in deceptive, misleading and false representations in violation of the Fair Debt Collection Practices Act, we hereby **VACATE** the summary judgment in favor of Defendants and **REMAND** this case to the district court with instructions for the district court to submit to the jury the question as to whether these letters were actually confusing to the least sophisticated consumer.

DISSENT

SUTTON, Circuit Judge, dissenting. From the founding, the States have taken debts—whether owed by them or to them—seriously. *Compare Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), with U.S. Const. amend. XI. If States have the sovereign right to set the terms of being sued, *see Alden v. Maine*, 527 U.S. 706, 715–27 (1999), they assuredly have a sovereign right to determine how, when, and whether to collect the myriad debts owed to them. No State to our knowledge employs all of the individuals needed to perform this sovereign function. *See* Nat'l Ass'n of State Auditors, Comptrollers, and Treasurers, *Government Debt Collection: Survey Report and Recommendations* 1–2 (2010), *available at* http://goo.gl/kO7GQ9. The States as a result hire other agents to collect the debts for them. In the State of Ohio, that means the Attorney General hires private lawyers—called "special counsel"—to collect debts on his behalf, to file and settle debt-collection lawsuits with his permission, and to serve at his pleasure. These lawyers become the Attorney General's agents for debt-collection purposes, just as the employees in the Collections Enforcement Section of the Attorney General's Office serve as his agents for these purposes, and together all of them are authorized to stand in his place when recovering the State's money.

Plaintiffs filed this class action against the State's special counsel under the Fair Debt Collection Practices Act, claiming that their debt collection letters were "false and misleading" because they used stationery with the Ohio Attorney General's name on it. That claim has two serious flaws. One is that the Act exempts state "officers" from its coverage. Under the Dictionary Act and the clear-statement rule es-

tablished by *Gregory v. Ashcroft*, 501 U.S. 452 (1991), the deputizing of private lawyers to act as assistant attorneys general makes them "officers" of the State for these collection purposes. Any other interpretation would mean that Congress meant to micromanage how a State structured its law-enforcement and debt-collection efforts and would create grave constitutional concerns along the way. The other flaw is that the special counsels' use of the Ohio Attorney General's stationery and the accurate description of their relationship with the State are not "false and misleading" under the statute. The stationery, which the Attorney General requires each special counsel to use, accurately describes the relevant legal realities—that the law firm acts as an agent of the Attorney General and stands in the shoes of the Attorney General in collecting money owed to the State. Because I would not apply the Fair Debt Collection Practices Act to state sovereign functions that Congress has not regulated and would not prohibit conduct that Congress has not banned, I must respectfully dissent.

I.

The Fair Debt Collection Practices Act prohibits debt collectors from using "false, deceptive, or misleading representation[s] or means in connection with the collection of any debt." 15 U.S.C. § 1692e. Mindful of the sovereign authority of the Federal Government and the States to determine how, when, and through whom to collect government debts, the Act exempts "any officer of the United States or any State to the extent that" debt collection ranks among "his official duties." 15 U.S.C. § 1692a(6)(C). The Dictionary Act defines "officer" as "any person

authorized by law to perform the duties of the office." 1 U.S.C. § 1. Outside counsel hired to handle governmental duties fit that definition to a tee.

Begin with the phrase "authorized by law." To "authorize" is '[t]o give legal authority," "to employer," or "to sanction." *Black's Law Dictionary* (10th ed. 2014). That is what Ohio's special-counsel statute does. It empowers the Attorney General to "appoint special counsel to represent the state" in connection with its debts, and it permits any action those private lawyers take when they invoke their attorney-general-given authority. Ohio Rev. Code § 109.08. But for the statute, the Attorney General has no power to hire private lawyers as contractors, and private lawyers have no power to speak on his (and by extension the State's) behalf. Section 109.08, to wrap up, is a "law" that "authorize[s]" special counsel to act.

Now consider the other key phrase: "the duties of the office." An "office" is a "position whose occupant has legal authority to exercise a government's sovereign power for a fixed period." *Black's Law Dictionary* (10th ed. 2014). Special counsel fit this bill as well. They serve one-year renewable terms in a position created and empowered by statute. In their hand rests nothing less than a portion of the Attorney General's sovereign power to "enforce" the civil code the Ohio legislature has crafted—"one of the quintessential functions of a State"—by in this instance collecting money due the State. *Diamond v. Charles*, 476 U.S. 54, 65 (1986); *see Associated Builders & Contractors v. Perry*, 16 F.3d 688, 692 (6th Cir. 1994). That may explain why, after Georgia lost *Chisholm* before the Supreme Court and was forced

to come to federal court to defend debt-collection efforts against it, the Supreme Court proceeded to lose *Chisholm* before the People. *See* U.S. Const. amend. XI. These are quintessentially sovereign functions concerning the People's money. Special counsel hired to perform core sovereign functions count as "officers" exempt from the Fair Debt Collection Practices Act's sweep.

Even if one thinks that the Dictionary Act's definition of "officer" is ambiguous in this context, the exemption still applies. When Congress purports to regulate core state functions, it must do so unambiguously. *Gregory*, 501 U.S. at 470. The *Gregory* clear-statement admonition bars courts from construing ambiguous federal statutes to "trench on the States' arrangements for conducting their own governments." *Nixon v. Mo. Mun. League*, 541 U.S. 125, 140 (2004). "If Congress intend[s] to recalibrate state and federal power in an area that has traditionally been the province of state government," it must be clear in doing so. *Jackson v. Sedgwick Claims Mgmt. Servs., Inc.*, 731 F.3d 556, 567 (6th Cir. 2013) (en banc).

Who can deny that plaintiffs' interpretation of "officer" "trench[es] on the States' arrangements for conducting their own governments"? *Nixon*, 541 U.S. at 140. The States' sovereign authority gives them power to structure their legal departments as they please, and their "varied" and "pragmatic" approaches have produced a "staggering[ly] divers[e]" array of governance arrangements. *Avery v. Midland Cnty.*, 390 U.S. 474, 482-83 (1968). As is its sovereign right, Ohio has empowered its Attorney General to deputize third parties to shoulder some of his duties.

He may appoint special counsel to "represent the state in civil actions, criminal prosecutions, or other proceedings in which the state is a party," Ohio Rev. Code § 109.07; to "act as attorney at law in any antitrust case" for the State and its residents, *id.* § 109.81; to "exercise al rights, privileges, and powers of prosecuting attorneys" in organized-crime cases, *id.* § 109.83; to "initiate and prosecute" violations of Ohio's workers compensation laws, *id.* § 109.84—and to "represent the state in connection with all claims of whatsoever nature which are certified to the attorney general for collection," *id.* § 109.08.

Nor does Ohio stand alone in this regard. *Every* State has delegated at least some of its debt-collection power to a non-State body. Sometimes that is the federal government, which in fiscal year 2013 collected more than $3 billion in delinquent debts on behalf of all fifty States. U.S. Dep't of the Treasury, *Fiscal Year 2013 Annual Report to the States: Treasury Offset Program Delinquent Debt Collections* 4 (2014), *available at* http://goo.gl/6O70u1; *see* 31 C.F.R. § 285.8. But other times that is a private entity. *See, e.g.*, Idaho Code Ann. § 67-2358(1); Or. Rev. Stat. § 293.231; Wash. Rev. Code § 19.16.500. One State's collections-assignment scheme bears more than a passing resemblance to Ohio's. California's Franchise Tax Board hires private contractors to collect debts on the State's behalf and authorizes them to "refer" debts "for litigation by [their] legal representatives in the name of the Franchise Tax Board" itself. Cal. Rev. & Tax Code § 19376(b). Interpreting the Fair Debt Collection Practices Act to regulate special counsel's activities undermines the State's decision to allocate law enforcement responsibilities between the Attor-

ney General and his agents however the State sees fit. Absent a clear congressional directive, federal courts have no license to interfere with that choice.

Plaintiffs, notably, concede that "[t]he term 'officer' is ambiguous" and "open to multiple[] yet reasonable interpretations." Reply Br. at 5. That should be the end of this case. Their inability to argue that the statute is unambiguous *in their favor* means the *Gregory* clear-statement rule answers the question presented: "officers" includes special counsel authorized by the Attorney General to handle specific government functions, including the collection of the State's debts.

Plaintiffs offer several contrary arguments, all unpersuasive. *First*, they raise a canon of their own: Remedial statutes must be construed liberally. *See Cobb v. Contract Transp., Inc.*, 452 F.3d 543, 559 (6th Cir. 2006). But we know that canon does not trump the *Gregory* clear-statement rule because *Gregory* itself involved a remedial statute, the Age Discrimination in Employment Act, and the Supreme Court insisted on a clear statement all the same.

Second, plaintiffs seek solace in two circuit court decisions holding that independent contractors cannot be officers: *Pollice v. National Tax Funding, L.P.*, 225 F.3d 379 (3d Cir. 2000), and *Brannan v. United Student Aid Funds, Inc.*, 94 F.3d 1260 (9th Cir. 1996). Neither case helps them. In *Pollice*, a municipal government *sold* its debts to a debt collector, 225 F.3d at 389, eliminating the possibility that the collector was somehow an officer of the government in collecting the debt *for the government*. And in *Brannan*, the collector and not the government owned the debt in the first place. 94 F.3d at 1262.

In this case, by contrast, the State of Ohio remains the ultimate creditor and thus its agents—special counsel—collect the debts on the State's behalf.

Third, plaintiffs argue that Congress could not have intended the state-officer exception to include special counsel because the Fair Debt Collection Practices Act has a separate provision giving the State an out: It may ask the federal Consumer Financial Protection Bureau to exempt special counsel from the Act's requirements. 15 U.S.C. § 1692o. That misunderstands how this relief valve functions. The Act permits the Bureau to exempt "any class of debt collection practices" subjected by state law to "substantially similar" consumer-protection requirements. *Id.* The relevant question is whether state law regulates a certain debt-collection *practice* as stringently as federal law, not whether the debt collectors carrying on that practice are "substantially similar" to *entities* the Act exempts. At any rate, the premise of this argument is false. Plaintiffs have not argued, nor have we found any indication, that the State's consumer-protection law regulates the Attorney General's use of his own letterhead.

Fourth, plaintiffs argue that Ohio does not treat special counsel as state officers under its own law for some purposes. But the question at hand is how the federal Fair Debt Collection Practices Act treats "officers," not how state law treats the term for some purposes. The only relevant state law question is whether the state law duties of special counsel satisfy the federal definition of "officer." They do. Even if state law definitions of "officer" *were* relevant, plaintiffs mischaracterize how Ohio uses the term for this purpose: debt collection. The state statute regulating

collection agencies defines such agencies as persons "who, for compensation, offer[] services to collect an alleged debt asserted to be owed to another." Ohio Rev. Code § 1319.12(A)(1). Just like its federal counterpart, it exempts "[a]ny public officer" from its terms, *id.* § 1319.12(A)(2)(e)—and Ohio courts define "officer" the same way the Dictionary Act does. "[T]he chief and most decisive characteristic of a public office," the Ohio Supreme Court has held, "is determined by the quality of the duties with which the appointee is invested, and by the fact that such duties are conferred upon the appointee by law." *Engel v. Univ. of Toledo Coll. of Med.*, 957 N.E.2d 764, 768 (Ohio 2011). Ohio courts applying that definition accord no significance to the fact that a particular appointee may *also* be an independent contractor whose statutorily prescribed duties are fleshed out by the terms of his contract. *See Solowitch v. Bennett*, 456 N.E.2d 562, 566 (Ohio Ct. App. 1982). All of this explains why Ohio regards even the Deputy Registrar of the Bureau of Motor Vehicles, an independent contractor under the statute, as an "officer." *Id.*

Finally, plaintiffs urge us to limit the Dictionary Act's definition because every state contractor would otherwise qualify as an "officer." Any such slope is not as steep or as slick as they imagine. The Ohio Facilities Construction Commission, cited by the majority in support of plaintiffs' view, proves the point: There is nothing "sovereign" about the power to "construct[] and repair" a state agency's buildings, Ohio Rev. Code § 123.21, and sovereign power remains a precondition of officer status. In other respects, the Dictionary Act's definition reads expansively because the definition is expansive. Congress knows how to supersede a Dictionary Act default and has done so

before: Title 5 defines "officer" as someone (1) "required by law to be appointed in the civil service" by the President, certain agency heads, or a federal court; (2) "engaged in the performance of a Federal function"; and (3) "supervis[ed]" by a limited group of people. 5 U.S.C. § 2104. Other restrictive definitions exist. To qualify as a principal officer under the National Constitution, a person must be presidentially appointed and senatorially approved, swear an oath of office, and "exercis[e] significant authority pursuant to the laws of the United States." *See Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 506 & n.9 (2010). Congress did not deviate from the Dictionary Act when drafting the Fair Debt Collection Practices Act. I would respect that choice and *Gregory*'s command that any ambiguity in the statute be construed in a way that does not interfere with how the State chooses to handle this core state function: debt collection.

II.

Even if the Fair Debt Collection Practices Act somehow covered debt-collection efforts by special counsel on behalf of the State, plaintiffs face another problem. The Act does not transform the special counsels' use of the Ohio Attorney General's stationery into "false," "deceptive," or "misleading" actions under the statute any more than it would do the same if a special counsel listed his or her name and firm under the Ohio Attorney General's name and address in a brief filed in this Court.

Recall the distribution of authority the special-counsel statute creates. Special counsel are the Attorney General's agents, authorized to stand in his place when collecting Ohio debts. As their contracts

makes clear, they "provide legal services" on the Attorney General's behalf. R. 48-8 at 2. They may file and settle lawsuits with the Attorney General's permission. *Id.* at 5. The Collections Enforcement Section of the Office of the Attorney General assigns them specific debts to collect, then audits their performance. *Id.* at 3. The State does not sell the debts to special counsel, and they thus remain debts of the State. *Id.* at 6. As a consequence, special counsel are no different from assistant attorneys general paid to recover the State's money. That is how the Attorney General treats them. Assistant attorneys general "frequently" help special counsel draft pleadings, and sometimes sign on as co-counsel when a "particularly sensitive or complex" case demands it. *See* R. 24 at 21. Assistant attorneys general even stand in for special counsel (and special counsel for assistant attorneys general) when illness strikes or when distance makes travel impractical, even if the replacement has not been formally assigned to the debt. *Id.*; *see Shapiro v. Ohio Attorney Gen.*, 725 N.E.2d 1232, 1235 (Ohio Ct. App. 1999). It thus should come as no surprise that the Attorney General *requires* his debt-collection agents to use his official stationery. *See* R. 5 at 2. In this context, an agent who uses his principal's letterhead speaks the truth; he does not say anything false or misleading.

Consider the plaintiffs' theory of liability under 15 U.S.C. § 1692e(9). That provision prohibits the use of letters that "simulate[]" or are "falsely represented" to be "document[s] authorized, issued, or approved by" a State, or that "create[] a false impression as to [their] source, authorization, or approval." *Id.* A document with the Attorney General's letterhead, it is no doubt true, gives the impression that it

comes from the Attorney General. But special counsel's dunning letters *do* come from the Attorney General. And plaintiffs have not produced any evidence that *these* special counsel exceeded the scope of their debt-collection authority under state law or the Attorney General's guidance.

Now consider plaintiffs' theory of liability under 15 U.S.C. § 1692e(14). That provision prohibits debt collectors from using "any business, company, or organization name other than the true name of the debt collector's business, company, or organization." Plaintiffs argue that, by employing the Attorney General's letterhead, special counsel "use" a "name other than the true name" of their law firms. Wrong again. Nothing about § 1692e(14) prohibits special counsel from affiliating themselves with the Office of the Ohio Attorney General. Although the statute never says what a "true name" is, its import is straightforward: A debt collector may not lie about his institutional affiliation. As the Federal Trade Commission, one of the federal agencies responsible for enforcing the Act, recognizes, a debt collector may use multiple names in his various affairs as long as the names "do[] not misrepresent his identity or deceive the consumer." Staff Commentary on the Fair Debt Collection Practices Act, 53 Fed. Reg. 50,097, 50,107 (Dec. 13, 1988). Here too the principal-agent relationship resolves the dispute. Special counsel may lawfully use the Attorney General's letterhead because, as his agents, they represent him in debt-related affairs.

An analogy makes the point. Many insurance agents are independent contractors. *See Weary v. Cochran*, 377 F.3d 522, 526 (6th Cir. 2004). Some

insurance agents are themselves separately incorporated. But no one bats an eye when an insurance agent working for John Doe Insurance Agency, Inc. uses Nationwide Mutual Insurance Co. letterhead when selling Nationwide insurance products on Nationwide's behalf. Just as there is nothing remotely untrue or misleading about using that letterhead, there is nothing remotely untrue or misleading about using this letterhead.

Plaintiffs offer several theories to resist this conclusion. Theory one: The letterhead misrepresents a special counsel's authority because state law purportedly prohibits special counsel from using the Attorney General's letterhead to collect these debts. But plaintiffs offer no caselaw to that effect. And Ohio's top legal official, the Attorney General, has said otherwise. He requires *all* special counsel performing debt collection on his behalf to use his letterhead, whether in the context of unpaid taxes or other state debts. *See* R. 5 at 2. Notably, plaintiffs *do not* argue that the Attorney General has violated state law. *See* R. 31 at 3 (affirmatively waiving the argument). In this setting, a private law firm cannot plausibly be tagged with liability under the Act for false or misleading acts when it *complies* with the directions of the State's top legal official about a matter of state law. The only thing that could be false or misleading in this setting would be to send out dunning letters on the *law firm's stationery*.

Theory two: The letterhead tricks debtors into believing they are being contacted by the Attorney General when they are in fact being contacted by someone else. That does not make sense either. Special counsel *are* the Attorney General when it

comes to debt collection, and as his agents possess just as much authority to invoke his name as an assistant attorney general or another of his employees. It makes no difference that special counsel are deemed independent contractors by contract, thanks to a basic principle of agency law: A person need not be a principal's employee to be that principal's agent. "[N]othing about the title independent contractor invariably precludes someone from being an agent under appropriate circumstances." *United States v. Hudson*, 491 F.3d 590, 595 (6th Cir. 2008) (citing *Restatement (Second) of Agency* § 2 cmt. b (1958)). For that inquiry, it does not matter whether special counsel work in the Attorney General's office building or their own office building, whether they use the Attorney General's computers or their own computers, whether they are insured by the Attorney General or by their own policies. The only question that matters is whether they exercise the Attorney General's debt-collection powers as his agents. They do.

Theory three: The letterhead confuses debtors into thinking that debts owed to the State of Ohio are more significant than a debt owed to a private entity such as a bank. Plaintiffs do not spell out the source of this alleged intimidation, but a few possibilities come to mind. One is the institutional affiliation printed on the letterhead: "Mike DeWine, Ohio Attorney General." *See* Appendix. But that is the same institutional affiliation conveyed by the letters' signature blocks. *E.g.*, *id.* ("Outside Counsel for the Attorney General's Office."). Plaintiffs conceded at argument that the Act does not bar special counsel from referencing their job title in their signatures. The letterhead's content thus cannot supply a cognizable basis for this claim.

Another possibility turns on the creditor itself: the State of Ohio. An official communication from the State could intimidate an unsophisticated consumer into thinking that the consequences of failing to pay this debt (as opposed to private debts) are more severe. But that fear is justified and anything but unsophisticated. From the perspective of a consumer, debts owed to Ohio (and other governments) *do* have consequences not shared by debts owed to private parties. For example, the State may deduct what it is due from a taxpayer's refund, whether the refund comes from the Federal Government, the State, or a local government. *See, e.g.*, Ohio Rev. Code § 5703.77(D) (credit account balances); *id.* § 5726.31 (financial institutions tax); *id.* § 5747.12 (income tax); 31 C.F.R. § 285.8 (federal tax). That is not true with respect to private debts. Debts owed to governments also take priority over most private debts in state probate proceedings. *See* Ohio Rev. Code § 2117.25(A). The special consequences of state debts explain why the Act bars debt collectors *unaffiliated* with a State from using the State's name to scare debtors into paying. When the State itself is doing the demanding, however, nothing about the resulting fear misleads. And when special counsel communicate with debtors, they stand in the State's shoes, just as the Attorney General would stand in the State's shoes if he pursued delinquent debtors himself. The only thing misleading in this setting would be to suggest (through a law firm letterhead alone) that this *was not a state debt*.

The last possibility is that the use of the Attorney General's letterhead evokes *un*justified fears: fear of the Attorney General "stop[ping] or delay[ing]" a pending bankruptcy. R. 48-2 at 1, or fear of being

charged with a crime, R. 48-3 at 2. But neither of the milquetoast letters in the record threatens criminal prosecution, civil penalties, or any action whatsoever. *See* Appendix. The letter to Pamela Gillie simply invites her to "make arrangements to pay" if she cannot satisfy her obligation in full, while the letter to Hazel Meadows simply discloses her current balance owed. *Id.* Not even the least sophisticated consumer could infer anything from these letters other than the reality that these were indeed state debts.

Theory four: The letterhead misleads debtors into thinking that special counsel are *not* associated with the State when in fact they are. True, the Office of the Attorney General has received calls from debtors worried that a special-counsel dunning letter is a scam. But that implies the letters do not say *enough* about how tightly knit the Attorney General and special counsel are—an implication that contradicts plaintiffs' entire theory of liability.

All of this may explain why the only circuit to confront an analogous governmental debt-collection practice has rejected plaintiffs' argument. *See Heredia v. Green*, 667 F.2d 392 (3d Cir. 1981). In *Heredia*, the Philadelphia Municipal Court appointed defendant Edward Green as a "landlord and tenant officer," as state law authorized it to do, and ordered him to deliver delinquency notices on the Court's behalf. *Id.* at 393, 395. Recognizing Green as an "officer," the Third Circuit turned aside plaintiffs' claims under the Fair Debt Collection Practices Act's officer exemption. To hold otherwise would place Green "in the anomalous position of being exposed to personal monetary liability for deceptively giving the impression that he was acting as an officer of the

court despite the fact that his actions had indeed been authorized by that court." *Id.* at 396 (Stern, J., concurring). As for *Peter v. GC Servs., L.P.*, 310 F.3d 344 (5th Cir. 2002), the Fifth Circuit never considered the relationship between the government and the defendants and thus never considered the agency question presented here.

The majority seeing things differently, I respectfully dissent.

APPENDIX

[BOTH TEXT AND IMAGES OF LETTERS REPRODUCED HERE]

[Attorney General Mike DeWine letterhead]

EXHIBIT A1
May 24, 2012

Pamela Gillie
2392 ROSECREST ST.
Grove City, OH 43123-8464

Reference: 8460030
Balance: $2227.46

Dear Sir/Madam,

You have chosen to ignore repeated attempts to resolving the referenced 8460030 medical claim. If you cannot make immediate full payment call DENISE HALL at Eric A. Jones, L.L.C., 614-545-9997 at my office to make arrangements to pay this debt.

THIS IS A COMMUNICATION FROM A DEBT COLLECTOR. THIS IS AN ATTEMPT TO COLLECT A DEBT. ALL INFORMATION OBTAINED WILL BE USED FOR THAT PURPOSE.

Sincerely,

/s/ Eric A. Jones

Eric A. Jones
Outside Counsel for the
Attorney General's Office
Telephone: 614-545-9998
Fax: 614-224-9300

RETURN THIS PORTION WITH YOUR PAYMENT

SEND PAYMENT TO:

Law Office of Eric A. Jones, L.L.C.
580 South High Street, Suite 100
Columbus, OH 43215

If paying by credit card, check box and please fill out below

[VISA] [MASTERCARD]

Card Number _____

V-Code__ (3 digit code on back of card) Exp. Date___

Amt. Paid_____

Print Name_____

Signature_____

MED3-1

Mike DeWine
Ohio Attorney General

EXHIBIT A1

May 24, 2012

Pamela Gillis 191353
2392 ROSECREST ST
Grove City, OH 43123-8464

Reference: 8460030
Balance: $2227.46

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Sincerely,

Eric A. Jones
Outside Counsel for the
Attorney General's Office
Telephone: 614-545-9998
Fax: 614-224-9300

RETURN THIS PORTION WITH YOUR PAYMENT

SEND PAYMENT TO:

Law Office of Eric A. Jones, L.L.C.
510 South High Street, Suite 100
Columbus, OH 43215

IF PAYING BY CREDIT CARD, CHECK BOX AND PLEASE FILL OUT BELOW

☐ [redacted] ☐ [redacted]

Card Number _____

V-Code _____ # Digits on Back of Card Exp. Date _____

Amt. Paid _____

Print Name _____

Signature _____

MED3-1

[Office of the Ohio Attorney General
Collections Enforcement Section letterhead]

EXHIBIT B1

July 20, 2012

HAZEL MEADOWS
587 SOUTH HARRIS AVENUE
COLUMBUS OH 43204

Re: STATE OF OHIO – UNIVERSITY OF AKRON
v. HAZEL MEADOWS
Amount of Claim: $2,581.07
*Our File No. 37430.001

Sir/Madam:

Per your request, this is a letter with the current balance owed for your University of Akron loan that has been placed with the Ohio Attorney General. Feel free to contact me at 614-221-2073 should you have any further questions.

Very truly yours,

/s/ Sarah Sheriff

Wiles, Boyle, Burkholder & Bringardner Co., LPA
300 Spruce Street
Columbus, Ohio 43215
Special County to the Attorney General for the State of Ohio

NOTICE – This is an attempt to collect a debt. Any information that we obtain will be used for that purpose. We will assume this debt to be valid unless you dispute the validity of all or any part of it within 30 days of receipt of this letter. If you notify us in writing you dispute all or part of the debt, we will obtain and send to you verification of the debt or a copy of

the judgment against you. Upon written request within 30 days after receipt of this notice, we will provide you with the name and address of the original creditor, if different from the creditor named above. We are debt collectors.

***IMPORTANT – PLEASE REFER TO OUR FILE NO. IN ALL COMMUNICATION**

EXHIBIT B1

Office of the Ohio Attorney General
Collections Enforcement Section

July 20, 2012

HAZEL MEADOWS
587 SOUTH HARRIS AVENUE
COLUMBUS OH 43204

RE: STATE OF OHIO - UNIVERSITY OF AKRON
v. HAZEL MEADOWS
Amount of Claim: $2,581.07
*Our File No: 37430.001

Sir/Madam:

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Very truly yours,

Sarah Sheriff

Sarah Sheriff
Wiles, Boyle, Burkholder & Bringardner Co., LPA
300 Spruce Street
Columbus, Ohio 43215
Special Counsel to the Attorney General for the State of Ohio

NOTICE - This is an attempt to collect a debt. Any information that we obtain will be used for that purpose. We will assume this debt to be valid unless you dispute the validity of all or any part of it within 30 days of receipt of this letter. If you notify us in writing that you dispute all or part of the debt, we will obtain and send to you verification of the debt or a copy of the judgment against you. Upon written request within 30 days after receipt of this notice, we will provide you with the name and address of the original creditor, if different from the creditor named above. We are debt collectors.

* IMPORTANT - PLEASE REFER TO OUR FILE NO. IN ALL COMMUNICATION

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. 2:13-cv0212
Judge Graham
Magistrate Judge Deavers
Filed: August 12, 2014

Pamela Gillie, et al.,

Plaintiffs,

v.

Law Office of Eric A. Jones, LLC, et al.,

Defendants.

OPINION AND ORDER

This matter is before the Court on the parties' Cross-Motions for Summary Judgment (docs. 47-51, 70). The Plaintiffs commenced the instant action against certain attorneys and their law offices that the Ohio Attorney General (OAG) has appointed to act as special counsel to collect debts owed to the State of Ohio. The Plaintiffs are Ohio residents who received at least one debt-collection letter written on the OAG's official letterhead from the Defendants. The Plaintiffs allege that the Defendants' use of the OAG's letterhead in their collections communications violates the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692 *et seq*, and seek to represent a class of similarly situated consumers. For the

following reasons, the Court: GRANTS the Defendants' Motions for Summary Judgment (docs. 47 & 51); DENIES the Plaintiffs' Motions for Summary Judgment (docs. 48-50); DENIES the OAG's Motion for Judgment on the Pleadings (doc. 46) and Motion for Summary Judgment (doc. 70); and DENIES AS MOOT the Plaintiffs Motion to Dismiss for Failure to State a Claim (doc. 41).

I. Background

The Attorney General is Ohio's chief law enforcement officer. O.R.C. § 109.02. Pursuant to Ohio law, the OAG is charged with collecting debts owed to state entities. O.R.C. § 131.02. To assist him with his collection efforts, the OAG "may appoint special counsel to represent the state in connection with all claims of whatsoever nature which are certified to the attorney general for collection under any law or which the attorney general is authorized to collect." O.R.C. § 109.08. Once appointed, special counsel execute standardized contracts with the OAG. OAG Counterclaim at ¶ 11, doc. 5. These contracts require, *inter alia*, special counsel to use official OAG letterhead for all collection activities. Id. at ¶¶ 8, 22.

In 2012, the OAG appointed Defendants Eric Jones and Mark Sheriff as special counsel to assist in the collection of debts pursuant to O.R.C. § 109.08. Defendant Jones operated the Law Office of Eric A. Jones, L.L.C. Defendant Mark Sheriff worked as a partner at Wiles, Boyle, Burkholder & Bringardner (the Wiles Law Firm). Defendant Sarah Sheriff worked in the collections department of the Wiles Law Firm. Ms. Sheriff was not appointed special counsel but assisted Mr. Sheriff in his collection efforts on behalf of the OAG.

In the spring of 2012, Plaintiff Pamela Gillie received a letter from Defendant Eric Jones of The Law Office of Eric A. Jones, LLC. Def. Jones's Letter, doc. 48-2. The OAG's letterhead appeared at the top of the letter. Id. It included the official state seal, the Attorney General's name, and the Attorney General's title. Id. The letter stated, "Dear Sir/Madam, You have chosen to ignore repeated attempts to resolving [sic] the referenced medical claim. If you cannot make immediate full payment call Denise Hall at Eric A. Jones, L.L.C., at my office to make arrangements to pay this debt." Id. The letter further explained that it was a communication from a debt collector and that the letter was an attempt to collect a debt. Id. In the signature block, Defendant Jones signed his name, noted that he was "Outside Counsel for the Attorney General's Office," and provided contact information at which he could be reached. Id. The letter further instructed Gillie to send payment to the Law Office of Eric A. Jones, L.L.C., and provided means of paying the debt discussed in the body of the letter. Id.

Later that summer, Plaintiff Hazel Meadows received a letter from Defendant Sarah Sheriff of the Wiles Law Firm. Def. Sheriff's Letter, doc. 48-4. The OAG's letterhead appeared at the top of the letter. Id. It included the official state seal next to the heading "Office of the Ohio Attorney General, Collection Enforcement Section." Id. The letter stated, "Sir/Madam: Per your request, this is a letter with the current balance owed for your University of Akron loan that has been placed with the Ohio Attorney General. Feel free to contact me should you have any further questions." Id. Defendant Sarah Sheriff signed the letter, included the name and address of

her law firm, and noted that she was "Special Counsel to the Attorney General for the State of Ohio." Id.

On March 5, 2013, the Plaintiffs filed a five-count Complaint (doc. 1) against the Defendants, alleging multiple violations of the FDCPA, 15 U.S.C. § 1692 *et seq*. The Plaintiffs assert that the Defendants' use of the OAG's letterhead was false, deceptive, or misleading. Specifically, the Plaintiffs allege that the Defendants:

(1) falsely represented or implied that they are vouched for, bonded by, or affiliated with the State of Ohio in violation of 15 U.S.C. § 1692e(1);

(2) used written communications which falsely represented to be a document authorized, issued or approved by the State of Ohio, or created a false impression that the OAG was the source of the letters, authorized the letters, or approved the letters in violation of 15 U.S.C. § 1692e(9);

(3) used false representation or deceptive means to collect or attempt to collect debts from the Plaintiffs in violation of 15 U.S.C. § 1692e(10); and

(4) used OAG letterhead in violation of 15 U.S.C. § 1692e(14)'s requirement that debt collectors use the "true name" of their business or company.[1]

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[1] In the alternative to the fourth count of the Complaint, the Plaintiffs allege that the Law Firm Defendants, as opposed to the individual attorney defendants, used OAG letterhead in vio-

Compl. at 15–19, doc. 1.

Shortly after the filing of the Complaint in this case, the Ohio Attorney General filed a Motion to Intervene as Defendant and Counterclaimant (doc. 3). In his counterclaim, the OAG requests a declaratory judgment stating that special counsel's use of OAG letterhead is not a violation of the FDCPA and that the OAG and State of Ohio are immune from liability under the FDCPA. OAG's Answer at 22, doc. 5. The Court subsequently granted the OAG's Motion to Intervene.

After granting the OAG's Motion, the Court stayed discovery and requested additional briefing on the issue of bifurcating this case. In late 2013, the Court issued a written Opinion and Order (doc. 42) bifurcating the issues of liability and damages and directing the parties to file dispositive motions within 60 days of the Court's Order. The Plaintiffs filed a Motion to Dismiss the OAG's Declaratory Judgment Claims (doc. 41). The parties subsequently filed cross-motions for summary judgment (doc. 47–51, 70) regarding the Defendants' alleged liability for violations of the FDCPA.[2] The Court held an oral hearing on the parties' cross-motions for summary judgment on June 10, 2014. The matter is now fully briefed and ripe for resolution.

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lation of 15 U.S.C. § 1692e(14)'s requirement that debt collectors use the "true name" of their business or company.

[2] The OAG filed a Motion for Judgment on the Pleadings (doc. 46) on its counterclaims, which the Court construed as a motion for summary judgment, see Order (doc. 69).

II. Standard of Review

Under Federal Rule of Civil Procedure 56, summary judgment is proper if the evidentiary material in the record shows that there is "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); see Longaberger Co. v. Kolt, 586 F.3d 459, 465 (6th Cir. 2009). The moving party bears the burden of proving the absence of genuine issues of material fact and its entitlement to judgment as a matter of law, which may be accomplished by demonstrating that the nonmoving party lacks evidence to support an essential element of its case on which it would bear the burden of proof at trial. See Celotex Corp. v. Catrett, 477 U.S. 317, 322–23 (1986); Walton v. Ford Motor Co., 424 F.3d 481, 485 (6th Cir. 2005).

The "mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247–48 (1986); see also Longaberger, 586 F.3d at 465. "Only disputed material facts, those 'that might affect the outcome of the suit under the governing law,' will preclude summary judgment." Daugherty v. Sajar Plastics, Inc., 544 F.3d 696, 702 (6th Cir. 2008) (quoting Anderson, 477 U.S. at 248). Accordingly, the nonmoving party must present "significant probative evidence" to demonstrate that "there is [more than] some metaphysical doubt as to the material facts." Moore v. Philip Morris Cos., Inc., 8 F.3d 335, 340 (6th Cir. 1993).

A district court considering a motion for summary judgment may not weigh evidence or make credibility

determinations. Daugherty, 544 F.3d at 702; Adams v. Metiva, 31 F.3d 375, 379 (6th Cir. 1994). Rather, in reviewing a motion for summary judgment, a court must determine whether "the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson, 477 U.S. at 251-52. The evidence, all facts, and any inferences that may permissibly be drawn from the facts must be viewed in the light most favorable to the nonmoving party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 456 (1992). However, "[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." Anderson, 477 U.S. at 252; see Dominguez v. Corr. Med. Servs., 555 F.3d 543, 549 (6th Cir. 2009).

III. Cross-Motions for Summary Judgment

"The Fair Debt Collection Practices Act is an extraordinarily broad statute." Frey v. Gangwish, 970 F.2d 1516, 1521 (6th Cir. 1992). Its purpose is to "to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses." 15 U.S.C. § 1692(e). To that end, the Act prohibits debt collectors from making "false, deceptive, or misleading communications in connection with the collection of any debt." 15 U.S.C. § 1692e.

Here, the Plaintiffs maintain that the Defendants' use of the OAG letterhead was false, deceptive, or misleading in violation of § 1692e. In order to establish a claim under § 1692e: (1) the plaintiff must be a "consumer" as defined by the Act; (2) the "debt" must arise out of transactions which are "primarily for personal, family or household purposes"; (3) the defendant must be a "debt collector" as defined by the Act; and (4) the defendant must have violated § 1692e's prohibitions. Wallace v. Wash. Mut. Bank, F.A., 683 F.3d 323, 326 (6th Cir. 2012). Here, the parties contest the third and fourth elements. The Court addresses each of these elements in turn.

A. Are special counsel "debt collectors" under the FDCPA?

The FDCPA applies to entities who are considered "debt collectors." Montgomery v. Huntington Bank, 346 F.3d 693, 698 (6th Cir. 2003). The term "debt collector" is defined by the Act as "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C. § 1692a(6). However, the FDCPA specifically excludes "any officer or employee of the United States or any State to the extent that collecting or attempting to collect any debt is in the performance of his official duties" from the definition of "debt collector." 15 U.S.C. § 1692a(6)(C).

The Plaintiffs argue that § 1692a(6)(C)'s exception does not apply to special counsel because they are independent contractors, rather than government officers or employees. According to the Plaintiffs, spe-

cial counsel executed Retention Agreements with the OAG that explicitly state that special counsel are independent contractors and not government employees or officers. To support their argument, the Plaintiffs cite numerous cases concluding that independent contractors are not covered by § 1692a(6)(C)'s exception.

In contrast, special counsel insist that they are appointed pursuant to statute and are therefore government officers or employees that fall within § 1692a(6)(C)'s exception. Consequently, they conclude that they are not debt collectors and therefore not subject to the FDCPA.

The case law addressing § 1692a(6)(C) is sparse. On the one hand, courts readily apply § 1692a(6)(C)'s exception to individuals that are clearly government officers or employees. See, e.g., Al-Sharif v. United States, 296 F. App'x 740, 742 (11th Cir. 2008) (applying § 1692a(6)(C)'s exception to IRS agents); Streater v. Cox, No. 07-11163, 2008 WL 564884, at *3 (E.D. Mich. Feb. 28, 2008) (applying § 1692a(6)(C)'s exception to Michigan Assistant Attorney Generals); Masterson v. Meade Cnty. Fiscal Court, et. al., 489 F. Supp. 2d 740, 757–58 (W.D. Ky. 2007) (applying § 1692a(6)(C)'s exception to county officials). On the other hand, courts generally do not apply § 1692a(6)(C)'s exception to private individuals and entities in a purely contractual relationship with the government. See, e.g., Pollice v. Nat'l Tax Funding, 225 F.3d 379, 406 (3d Cir. 2000) (holding that § 1692a(6)(C) applies only to state "officers" or "employees" and that it "does not extend to those who are merely in a contractual relationship with the government"); Brannan v. United Student Aid Funds,

Inc., 94 F.3d 1260, 1263 (9th Cir. 1996) (§ 1692a(6)(C) "applies only to an individual government official or employee who collects debts as part of his government employment responsibilities. USA Funds is a private nonprofit organization with a government contract; it is not a government agency or employee."); Piper v. Portnoff Law Assoc., 274 F Supp. 2d 681, 683 (E.D. Pa. 2003) (finding that law firm contractually bound to collect debts on behalf of municipality did not fall within FDCPA exception for government officers); Gradisher v. Check Enforcement Unit, Inc., 133 F Supp. 2d 988, 992 (W.D. Mich. 2001) ("[A]n independent contractor is not entitled to an exemption to the FDCPA [I]f the legislature had intended to allow independent contractors, rather than just government agencies and employees, to escape liability under the FDCPA, it could have explicitly stated as much.").

The facts of this case are distinct from the cases cited above. Here, special counsel are appointed pursuant to Ohio statute but are also in a contractual relationship with the OAG. To establish whether special counsel are "debt collectors" under the FDCPA, the Court must determine whether special counsel are an "officer or employee," 15 U.S.C. § 1692a(6)(C), of the State of Ohio.

"When presented with a matter of statutory interpretation, we begin with the language of the Act itself." Ashland Hosp. Corp. v. Serv. Emps. Intern. Union, Dist. 1199 WV/KY/OH, 708 F.3d 737, 741 (6th Cir. 2013) (collecting cases). "If the meaning of the Act's language is plain, we give it effect and our analysis comes to an end." Id. (citing United States v. Ron Pair Enters., 489 U.S. 235, 240–41 (1989)).

The FDCPA does not define the terms "officer" or "employee" See 15 U.S.C. § 1692a(6). Therefore, the Court's analysis begins with the Dictionary Act, which provides rules for interpreting "any Act of Congress, unless the context indicates otherwise," 1 U.S.C. § 1. See Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2014 WL 2921709, at *14 (June 30, 2014) ("RFRA itself does not define the term 'person.' We therefore look to the Dictionary Act, which we must consult '[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise.' 1 U.S.C. § 1."). The Dictionary Act defines the term "officer" as "any person authorized by law to perform the duties of the office." 1 U.S.C. § 1. Nothing in the FDCPA indicates that the Dictionary Act's definition of "officer" should not apply in the context of 15 U.S.C. § 1692a(6).

Here, one of the OAG's duties as chief law enforcement officer for the State of Ohio is the collecting of debts owed to state entities. O.R.C. § 131.02. To assist him with the duties of his office, the OAG appoints special counsel pursuant to statute "to represent the state in connection with all claims of whatsoever nature which are certified to the attorney general for collection under any law or which the attorney general is authorized to collect." O.R.C. § 109.08. In other words, special counsel are authorized by law to perform the duties of the OAG with respect to the collection of debts owed to the State of Ohio. The Court therefore concludes that special counsel are "officers" within the meaning of the term as used in 15 U.S.C. § 1692a(6)(C) and, consequently, finds that special counsel are not "debt collectors" under the FDCPA.

The Plaintiffs place great weight on the Retention Agreements executed by special counsel and the OAG. The language of those agreements supports the proposition that special counsel are independent contractors. The Retention Agreement for special counsel provides:

> Special Counsel is being appointed hereunder to provide legal services on behalf of the Attorney General to one or more State Clients. Special counsel will render services to this Retention Agreement as an independent contractor. Special counsel, whether for purposes of applications of Ohio. R.C. Chapter 102, Section 8.86 or Section 9.87, or for any other purpose, shall not be regarded as "in the employment of", or as an employee of, the Attorney General or any State Client.
>
> During the term of this appointment, Special Counsel shall be engaged by the Attorney General solely on an independent contractor basis[.]

Retention Agreement for Collections Special Counsel at 2, doc. 48-7. See also Fiscal Year 2013 Retention Agreement Collections Special Counsel at 2, doc. 48-8 (using almost identical language to describe special counsel as "independent contractors" and not state employees).

Even so, the Court is not persuaded that the language of the Retention Agreements should control the Court's interpretation of § 1692a(6)(C) as informed by the Dictionary Act's definition of "officer." The Plaintiffs' position would require the Court to ignore the fact that special counsel are appointed by

the OAG pursuant to Ohio statute for the specific purpose of collecting debts owed to the State of Ohio. The Plaintiffs take an overly narrow view of special counsel's authority and fail to consider the significance of this authority given the meaning of the term "officer" as used in § 1692a(6)(C). The Court finds the Plaintiffs' arguments unpersuasive.

Finally, the Plaintiffs argue, a 1975 advisory opinion issued by the Ohio Ethics Commission of the Ohio Supreme Court clearly establishes that special counsel are nothing more than independent contractors. In its advisory opinion, the Commission considered whether special counsel appointed pursuant to O.R.C. § 109.08 were "elected or appointed to an office of or employed by" a state entity and, consequently, were prohibited from receiving compensation for services in any case or proceeding before other state entities pursuant to O.R.C. § 102.04(A). Ohio Eth. Com., 1975 WL 184266 (Aug. 19, 1975). Reviewing § 102.04(A), the Commission concluded that special counsel "are not within the purview of Section 102.04 of the Revised Code by virtue of being 'elected to an office' nor do they seem to be 'appointed to an office' of an instrumentality of the state." Id. at *1. The Commission then considered whether special counsel were employees of the OAG and found that special counsel were independent contractors not subject to § 102.04(A)'s restrictions. Id. at *2-*4.

The Court first notes that the opinion of a state ethics commission is not binding upon the federal courts. More significantly, the Commission's advisory opinion interpreted a provision of state law unrelated to the FDCPA, the federal statute at issue in this case. The Commission's advisory opinion may

very well be correct as a matter of state law, but that is beside the point here. The definition of the term "officer" as used in § 1692a(6)(C) of the FDCPA sweeps broadly and includes "any person authorized by law to perform the duties of the office," 1 U.S.C. § 1. Because the Commission's advisory opinion does not address the statute and definition at issue in the present case, it does not alter the Court's conclusion that special counsel are not debt collectors under the terms of the FDCPA. Special counsel are therefore entitled to summary judgment as a matter of law. [3]

B. Did the Defendants Violate the FDCPA?

Assuming *arguendo* that the Defendants are debt collectors under the FDCPA, the Court considers whether the Defendants violated the FDCPA. The

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[3] In an effort to avoid the time and expense of class-wide discovery, this Court previously stayed discovery in this case in its September 6, 2013 Order (doc. 28). After bifurcating the issues of liability and damages, the Court directed the parties to file dispositive motions as to the individual plaintiffs in this case. December 4, 2013 Order, doc. 42. The Plaintiffs did not file a motion for leave to conduct discovery and proceeded to submit motions for summary judgment. "A plaintiff pursuing a claim under the FDCPA bears the burden of establishing that the defendant is a debt collector within the meaning of the FDCPA." Passa v. City of Columbus, 748 F Supp. 2d 804, 810 (S.D. Ohio 2010) (citing Goldstein v. Hutton, Ingram, Yuzek, Gainen, Carroll & Bertolotti, 374 F.3d 56, 60 (2nd Cir. 2004)). Here, the Plaintiffs offer no evidence that the Law Firm Defendants or Defendant Sarah Sheriff are debt collectors under the FDCPA. See Schroyer v. Frankel, 197 F.3d 1170, 1176 (6th Cir. 1999) (discussing type of evidence necessary to establish that a law firm is a "debt collector" under the FDCPA). In the interest of fairness, given the lack of discovery in this case, the Court resolves the issue of the Law Firm Defendants' and Defendant Sarah Sheriff's liability on alternative grounds.

Plaintiffs allege that the Defendants violated four subsections of 15 U.S.C. § 1692e: 1692e(1), 1692e(9), 1692e(10), and 1692e(14). Respectively these subsections prohibit:

> [t]he false representation or implication that the debt collector is vouched for, bonded by, or affiliated with any State, 15 U.S.C. § 1692e(1);
>
> [t]he use or distribution of any written communication which simulates or is falsely represented to be a document authorized, issued, or approved by any official or agency of any State, or which creates a false impression as to its source, authorization, or approval, id. at § 1692e(9);
>
> [t]he use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer, id. at § 1692e(10); and
>
> [t]he use of any business, company, or organization name other than the true name of the debt collector's business, company, or organization, id. at § 1692e(14).

15 U.S.C. § 1692e. The Plaintiffs offer detailed arguments as to the violation of each of these subsections. The thrust of their arguments is that special counsel's use of the OAG letterhead violates the FDCPA because it misleads consumers as to the source of the debt collection letters and falsely implies that the letters are from the OAG instead of special counsel and their law firms. In the Plaintiffs' view, special counsel's use of the OAG letterhead is meant to intimidate consumers and pressure them

into paying special counsel, contrary to the purpose of the FDCPA.

To determine whether a communication is "false, deceptive or misleading," courts examine the communication under a "least sophisticated consumer" standard.[4] Wallace v. Wash. Mut. Bank, F.A., 683 F.3d 323, 326 (6th Cir. 2012). This is an objective standard. See Harvey v. Great Seneca Fin. Corp., 453 F.3d 324, 331 (6th Cir. 2006) ("courts apply an objective test based on the understanding of the least

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[4] In their filings, the parties treat the question of whether the Defendants have violated 15 U.S.C. § 1692e as a question of law for the Court to decide. However, in the Sixth Circuit, courts submit close cases under § 1692e to a jury. See Kistner v. Law Offices of Michael P. Margelefsky, LLC, 518 F.3d 433, 440–41 (6th Cir. 2008). As one district court judge has helpfully explained:

> In applying the "least sophisticated consumer" standard, the Sixth Circuit has adopted the "more than one reasonable interpretation standard." Kistner, 518 F.3d at 441. Under that approach, a collection letter can be "deceptive" if it is open to "more than one reasonable interpretation, at least one of which is inaccurate." Id. (quoting Clomon v. Jackson, 988 F.2d 1314, 1319 (2d Cir. 1993)). "[T]he 'more than one reasonable interpretation' standard is applicable to the entirety of § 1692e as a useful tool in analyzing the least sophisticated consumer test." Id. Therefore, where a letter could be susceptible to more than one reasonable interpretation and one of these interpretations is inaccurate, there is a question of fact for the jury to decide. Id.

Samples v. Midland Credit Mgmt., Inc., No. 3:12–cv–00099, 2012 WL 2576392, at *7 (M.D. Tenn. July 2, 2012). Because the Court concludes that there is only one reasonable interpretation of the letters in question, the Court considers the question of whether the Defendants have violated 15 U.S.C. § 1692e as a question of law.

sophisticated consumer") (internal quotations omitted)). The least sophisticated consumer test is designed "to ensure that the FDCPA protects all consumers, the gullible as well as the shrewd." Kistner v. Law Offices of Michael P. Margelefsky, LLC, 518 F.3d 433, 438 (6th Cir. 2008) (quotations and citation omitted). This standard "preserv[es] a quotient of reasonableness and presum[es] a basic level of understanding and willingness to read with care." Fed. Home Loan Mortg. Corp. v. Lamar, 503 F.3d 504, 510 (6th Cir. 2007) (citation omitted). See also Miller v. Javitch, Block & Rathbone, 561 F.3d 588, 595 (6th Cir. 2009) (citing Lamar, 503 F.3d at 510) (recognizing that the least sophisticated consumer standard assumes that the communication at issue "is read in its entirety, carefully, and with some elementary level of understanding").

Further, to establish a violation of § 1692e, a communication must be materially false or misleading, that is, the statement must be technically false, and one which would tend to mislead or confuse the reasonable unsophisticated consumer. Wallace, 683 F.3d at at 326-27. The parties disagree as to whether the materiality requirement applies to each of § 1692e's subsections. The Plaintiffs insist that the materiality standard only applies to § 1692e(10), the statute's catch-all provision. In their view, the conduct prohibited in the remaining § 1692e subsections is a *per se* violation of the FDCPA. In contrast, the Defendants argue that the materiality standard applies to all of § 1692e's subsections.

The Defendants have the better argument in light of Sixth Circuit precedent. In Miller, the Sixth Circuit rejected the plaintiff's claims under § 1692e(2),

§ 1692e(10), and § 1692e(12) on materiality grounds. 561 F.3d at 596. The court stated:

> Writing for the Seventh Circuit, Judge Easterbrook recently observed that "[m]ateriality is an ordinary element of any federal claim based on a false or misleading statement." Seeing no "reason why materiality should not equally be required in an action based on § 1692e," Judge Easterbrook found a statement "false in some technical sense" immaterial. "A statement cannot mislead unless it is material, so a false but non-material statement is not actionable." We agree.

Id. (internal citations omitted). The court reiterated its commitment to the materiality standard in Wallace, asserting that, in applying the least sophisticated consumer standard, "a statement must be materially false or misleading to violate Section 1692e." 83 F.3d at 326. Continuing, the court observed that "[t]he materiality standard simply means that in addition to being technically false, a statement would tend to mislead or confuse the reasonable unsophisticated consumer." Id. at 326–27 Characterizing the plaintiff's claims as arising under § 1692e(2) and § 1692e(10), id. at 324 n.1, the court found that "a clearly false representation of the creditor's name" might satisfy this standard, id. at 327.

In the Court's view, these Sixth Circuit decisions control its analysis here. Both the Miller and Wallace courts applied the materiality standard to claims under multiple subsections of § 1692e. Neither decision limited the application of the materiality standard to 1692e's general prohibition on the "use any false, deceptive, or misleading representa-

tion or means in connection with the collection any debt" or § 1692e(10)'s catch-all provision, which prohibits "[t]he use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer." Therefore, the Court will apply the materiality standard to the Plaintiffs' claims in this case.

Here, the collection letters include the OAG's letterhead prominently in the header. Defendant Jones's letter to Plaintiff Gillie states, "Dear Sir/Madam, You have chosen to ignore repeated attempts to resolving [sic] the referenced medical claim. If you cannot make immediate full payment call Denise Hall at Eric A. Jones, L.L.C., at my office to make arrangements to pay this debt." Def. Jones's Letter, doc. 48-2. Defendant Sarah Sheriff's letter to Plaintiff Meadow states, "Sir/Madam: Per your request, this is a letter with the current balance owed for your University of Akron loan that has been place with the Ohio Attorney General. Feel free to contact me should you have any further questions." Def. Sheriff's Letters, doc. 48-4. Both letters explain that they are communications from a debt collector and that the letters are an attempt to collect a debt. The letters are signed by special counsel in their individual capacity and identify themselves as "Special Counsel to the Attorney General for the State of Ohio" or "Outside Counsel for the Attorney General's Office." The letters include the names and addresses of the Defendants' law firms.[5]

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[5] The name and address of Defendant Jones's law firm is not included in the signature block of his letter. See Def. Jones's Letter. Instead, it is listed as the return address on the payment ticket at the bottom of the letter. Id. Defendant Sarah

When "read in [their] entirety, carefully, and with some elementary level of understanding," Miller, 561 F.3d at 595, the Court finds that the least sophisticated consumer would not be materially misled by the Defendants' letters in this case. In sending these letters, special counsel act as representatives of the State of Ohio appointed by the OAG to collect debts owed to the State. O.R.C. § 109.08 (the OAG appoints special counsel pursuant to statute "to represent the state in connection with all claims of whatsoever nature which are certified to the attorney general for collection under any law or which the attorney general is authorized to collect"). The letters accurately reflect this relationship.

Defendant Sarah Sheriff's letter to Plaintiff Meadows requires additional analysis. During the relevant time period, pursuant to a 2008 agreed judgment, Plaintiff Meadows made monthly payments to the Wiles Law Firm for a debt she owed to the State Ohio. M. Sheriff Aff. at ¶¶ 4-5, doc. 60-2. In 2012, Plaintiff Meadows contacted Defendant Sarah Sheriff at the Wiles Law Firm and asked for her remaining balance as to that debt. Sheriff Aff. at ¶ 9, doc. 60-1. Defendant Sarah Sheriff sent the letter at issue in this case in response to Plaintiff Meadows' request. Id. at ¶¶ 9-10. In her letter, Defendant Sarah Sheriff informed Plaintiff Meadows of the then

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Sheriff provides the name and address of her firm in the signature block of her letter. See Def. Sheriff's Letter, doc. 48-4. The Court concludes that special counsel's inclusion of the names of their law firms in the letters in question was not materially misleading. The letters accurately described special counsel's place of employment and provided a physical location at which special counsel could be contacted.

current balance of Plaintiff Meadows' debt and signed her name above a signature block listing her title as "Special Counsel to the Attorney General for the State of Ohio." Def. Sheriff's Letter, doc. 48-4. It is undisputed that Defendant Sarah Sheriff was not appointed special counsel by the OAG. It is also undisputed that the letter's contents were otherwise accurate and responsive to Plaintiff Meadows' request. When viewed objectively in this context, Defendant Sarah Sheriff's signature with the title of special counsel is not materially misleading. The least sophisticated consumer in Plaintiff Meadows' position could not be confused as to the source of Defendant Sarah Sheriff's letter because Plaintiff Meadows contacted the Defendants and requested the information provided in the letter. Defendant Sarah Sheriff is therefore entitled to summary judgment.

The Plaintiffs place great weight on special counsel's use of the OAG letterhead. In their view, the letterhead misleads consumers as to the source of the letters in this case.[6] But this argument ignores spe-

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[6] The FDCPA prohibits "[t]he use or distribution of any written communication which creates a false impression as to its source, authorization, or approval." 15 U.S.C. § 1692e(9). "Courts have generally limited the application of § 1692e(9) to egregious situations where the debt collector overtly impersonates a government agency or where it attempts to hide its identity by using a false alias." Sullivan v. Credit Control Servs., Inc., 745 F. Supp. 2d 2, 10 (D. Mass. 2010). See also Buckalew v. Suttel & Hammer, P.S., No. CV–10–3002–LRS, 2010 WL 3944477, at *2 (E.D. Wash. Oct.7, 2010) (same). Given the official relationship between the OAG and special counsel, the letters here do not indicate that special counsel were overtly impersonating the OAG or attempting to hide their identity.

cial counsel's statutory and contractual relationship with the OAG. Whether special counsel or the OAG are the source of the letters, special counsel act on behalf of the OAG to collect debts owed to the State. Any initial confusion that the least sophisticated consumer might experience upon seeing the OAG's name and letterhead is dispelled by special counsel's signature in which they identify themselves and their relationship to the OAG.

Because the letters in this case are not subject to "more than one reasonable interpretation," Kistner, 518 F.3d at 441, the Court concludes as a matter of law that the Defendants did not violate 15 U.S.C. § 1692e in this case. The Defendants are therefore entitled to summary judgment.

The FDCPA also prohibits debt collectors from using "any business, company, or organization name other than the true name of the debt collector's business, company, or organization" in a debt collection communication. 15 U.S.C. § 1692e(14). The Plaintiffs insist that special counsel violated this subsection by using the OAG's name in their communications to debtors. "The aim of § 1692e(14) is to prevent debt collectors from using a name other than [their] own in an attempt to mislead or deceive a consumer." Weinstein v. Fink, No. 99 C 7222, 2001 WL 185194, *5 (N.D. Ill. Feb. 26, 2001). Although the Plaintiffs may be correct that the OAG's name is not special counsel's "true name," it is unclear to the Court how the inclusion of the OAG's name is materially misleading in light of special counsel's identification of their relationship with the OAG. "[T]he cases in which a violation of § 1692e(14) have been found typically involve a debt collector misrepresenting its identity, such as by purporting to be the creditor when it is not, purporting to be a government agency when it is not, or purporting to be distinct from the creditor when it is not." Mahan v. Retrieval-Masters Credit Bureau, Inc., 777 F. Supp. 2d 1293, 1300 (S.D. Ala. 2011). In the Court's view, this case does not involve such conduct on the part of special counsel.

IV Request for Declaratory Judgment

With his Answer (doc. 24), the OAG filed a counterclaim against the Plaintiffs, seeking a declaration that: (1) special counsel's use of the OAG letterhead does not violate any provision of the FDCPA and (2) the OAG and State of Ohio are immune from liability under the FDCPA. The Plaintiffs filed a Motion to Dismiss the OAG's Counterclaim (doc. 41) on December 20, 2013. The OAG filed a Motion for Judgment on the Pleadings (doc. 46) concerning its counterclaim on February 3, 2014. The Court converted the OAG's Motion to a motion for summary judgment, (doc. 69), and the OAG filed his Motion for Summary Judgment (doc. 70) on May 7, 2014 accordingly.

The Declaratory Judgment Act provides that "[i]n a case of actual controversy within its jurisdiction any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201(a). The Supreme Court has "repeatedly characterized the Declaratory Judgment Act as 'an enabling Act, which confers a discretion on the courts rather than an absolute right upon the litigant.'" Wilton v. Seven Falls Co., 515 U.S. 277, 287 (1995) (quoting Public Serv. Comm'n of Utah v. Wycoff Co., 344 U.S. 237, 241 (1952)). The general considerations for determining whether to exercise jurisdiction in a declaratory judgment action are whether the judgment "will serve a useful purpose in clarifying and settling the legal relationships in issue" and whether it "will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding." Grand Trunk

Western R.R. v. Consolidated Rail Corp., 746 F.2d 323, 326 (6th Cir. 1984). The court in Grand Trunk set forth the following factors to be considered when applying these principles:

> (1) whether the declaratory action would settle the controversy;
>
> (2) whether the declaratory action would serve a useful purpose in clarifying the legal relations in issue;
>
> (3) whether the declaratory action is being used merely for the purpose of "procedural fencing" or "to provide an arena for a race for res judicata;"
>
> (4) whether the use of a declaratory action would increase the friction between our federal and state courts and improperly encroach on state jurisdiction; and
>
> (5) whether there is an alternative remedy which is better and more effective.

Id.

The Court declines to exercise its jurisdiction over the OAG's declaratory judgment request here. With respect to the OAG's request that the Court declare that special counsel's use of the OAG letterhead does not violate the FDCPA,[7] the court believes that the

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[7] With respect to the OAG's request that the Court declare the State of Ohio and the OAG immune from liability under the FDCPA, the Court notes that multiple courts have found that the FDCPA does not contain an express and unequivocal waiver of sovereign immunity. Wagstaff v. United States Dep't of Educ., 509 F.3d 661, 664 (5th Cir. 2007); Ha v. United States Dep't of Educ., 680 F. Supp. 2d 45, 47 (D.D.C. 2010); United

parties' motions for summary judgment are better and more effective vehicles for "clarifying and settling the legal relationships in issue" and "afford[ing] relief from the controversy giving rise to the [instant] proceeding." Grand Trunk Western R.R., 746 F.2d at 326. In ruling on the parties' motions for summary judgment, the Court was able to address (1) whether special counsel were "debt collectors" under the FDCPA and (2) whether the specific letters sent by special counsel violated the FDCPA. A ruling on the OAG's declaratory judgment request is unnecessary given the Court's holding as to these issues.

V Conclusion

For the foregoing reasons, the Court: GRANTS the Defendants' Motions for Summary Judgment (docs. 47 & 51); DENIES the Plaintiffs' Motions for Summary Judgment (docs. 48-50); DENIES the OAG's Motion for Judgment on the Pleadings (doc. 46) and Motion for Summary Judgment (doc. 70); and DENIES AS MOOT the Plaintiff's Motion to Dismiss for Failure to State a Claim (doc. 41).

IT IS SO ORDERED.

S/ James L. Graham
James L. Graham
UNITED STATES DISTRICT JUDGE

DATE: August 12, 2014

States v. Errigo, No. 08–CV–12506, 2009 WL 127863, at *2 (E.D. Mich. Jan. 20, 2009); Little v. Tenn. Student Assistance Corp., 537 F. Supp. 2d 942, 944 (W.D. Tenn. 2008) (Donald. J.); Sorrell v. Ill. Student Assistance Comm'n, 314 F Supp. 2d 813, 817 (C.D. Ill. 2004). This supports the OAG's position that the State of Ohio and the OAG is immune from liability under the FDCPA.

APPENDIX D

15 U.S.C.A. § 1692a

§ 1692a. Definitions

As used in this subchapter –

(1) The term "Bureau" means the Bureau of Consumer Financial Protection.

(2) The term "communication" means the conveying of information regarding a debt directly or indirectly to any person through any medium.

(3) The term "consumer" means any natural person obligated or allegedly obligated to pay any debt.

(4) The term "creditor" means any person who offers or extends credit creating a debt or to whom a debt is owed, but such term does not include any person to the extent that he receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another.

(5) The term "debt" means any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment.

(6) The term "debt collector" means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of

which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. Notwithstanding the exclusion provided by clause (F) of the last sentence of this paragraph, the term includes any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts. For the purpose of section 1692f(6) of this title, such term also includes any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests. The term does not include—

(A) any officer or employee of a creditor while, in the name of the creditor, collecting debts for such creditor;

(B) any person while acting as a debt collector for another person, both of whom are related by common ownership or affiliated by corporate control, if the person acting as a debt collector does so only for persons to whom it is so related or affiliated and if the principal business of such person is not the collection of debts;

(C) any officer or employee of the United States or any State to the extent that collecting or attempting to collect any debt is in the performance of his official duties;

(D) any person while serving or attempting to serve legal process on any other person in connection with the judicial enforcement of any debt;

(E) any nonprofit organization which, at the request of consumers, performs bona fide consumer credit counseling and assists consumers in the liquidation of their debts by receiving payments from such consumers and distributing such amounts to creditors; and

(F) any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity (i) is incidental to a bona fide fiduciary obligation or a bona fide escrow arrangement; (ii) concerns a debt which was originated by such person; (iii) concerns a debt which was not in default at the time it was obtained by such person; or (iv) concerns a debt obtained by such person as a secured party in a commercial credit transaction involving the creditor.

(7) The term "location information" means a consumer's place of abode and his telephone number at such place, or his place of employment.

(8) The term "State" means any State, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any political subdivision of any of the foregoing.

APPENDIX E

15 U.S.C.A. § 1692e

§ 1692e. False or misleading representations

A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

(1) The false representation or implication that the debt collector is vouched for, bonded by, or affiliated with the United States or any State, including the use of any badge, uniform, or facsimile thereof.

(2) The false representation of—

(A) the character, amount, or legal status of any debt; or

(B) any services rendered or compensation which may be lawfully received by any debt collector for the collection of a debt.

(3) The false representation or implication that any individual is an attorney or that any communication is from an attorney.

(4) The representation or implication that nonpayment of any debt will result in the arrest or imprisonment of any person or the seizure, garnishment, attachment, or sale of any property or wages of any person unless such action is lawful and the debt collector or creditor intends to take such action.

(5) The threat to take any action that cannot legally be taken or that is not intended to be taken.

(6) The false representation or implication that a sale, referral, or other transfer of any interest in a debt shall cause the consumer to—

(A) lose any claim or defense to payment of the debt; or

(B) become subject to any practice prohibited by this subchapter.

(7) The false representation or implication that the consumer committed any crime or other conduct in order to disgrace the consumer.

(8) Communicating or threatening to communicate to any person credit information which is known or which should be known to be false, including the failure to communicate that a disputed debt is disputed.

(9) The use or distribution of any written communication which simulates or is falsely represented to be a document authorized, issued, or approved by any court, official, or agency of the United States or any State, or which creates a false impression as to its source, authorization, or approval.

(10) The use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer.

(11) The failure to disclose in the initial written communication with the consumer and, in addition, if the initial communication with the consumer is oral, in that initial oral communication, that the

debt collector is attempting to collect a debt and that any information obtained will be used for that purpose, and the failure to disclose in subsequent communications that the communication is from a debt collector, except that this paragraph shall not apply to a formal pleading made in connection with a legal action.

(12) The false representation or implication that accounts have been turned over to innocent purchasers for value.

(13) The false representation or implication that documents are legal process.

(14) The use of any business, company, or organization name other than the true name of the debt collector's business, company, or organization.

(15) The false representation or implication that documents are not legal process forms or do not require action by the consumer.

(16) The false representation or implication that a debt collector operates or is employed by a consumer reporting agency as defined by section 1681a(f) of this title.

APPENDIX F

Ohio Rev. Code § 109.08

109.08 Special counsel to collect claims; letterhead stationery

The attorney general may appoint special counsel to represent the state in connection with all claims of whatsoever nature which are certified to the attorney general for collection under any law or which the attorney general is authorized to collect.

Such special counsel shall be paid for their services from funds collected by them in an amount approved by the attorney general.

The attorney general shall provide to the special counsel appointed to represent the state in connection with claims arising out of Chapters 5733., 5739., 5741., and 5747. of the Revised Code the official letterhead stationery of the attorney general. The special counsel shall use the letterhead stationery, but only in connection with the collection of such claims arising out of those taxes.

APPENDIX G

Ohio Rev. Code § 131.02

131.02 Collection of moneys due state; interest; compromise of claim or extending time to pay; limitation of actions

(A) Except as otherwise provided in section 4123.37, section 5703.061, and division (K) of section 4123.511 of the Revised Code, whenever any amount is payable to the state, the officer, employee, or agent responsible for administering the law under which the amount is payable shall immediately proceed to collect the amount or cause the amount to be collected and shall pay the amount into the state treasury or into the appropriate custodial fund in the manner set forth pursuant to section 113.08 of the Revised Code. Except as otherwise provided in this division, if the amount is not paid within forty-five days after payment is due, the officer, employee, or agent shall certify the amount due to the attorney general, in the form and manner prescribed by the attorney general, and notify the director of budget and management thereof. In the case of an amount payable by a student enrolled in a state institution of higher education, the amount shall be certified within the later of forty-five days after the amount is due or the tenth day after the beginning of the next academic semester, quarter, or other session following the session for which the payment is payable. The attorney general may assess the collection cost to the amount certified in such manner and amount as prescribed by the attorney general. If an amount payable to a political subdivision is past due, the political subdivision may, with the approval of the attorney general, certify the

amount to the attorney general pursuant to this section.

For the purposes of this section, the attorney general and the officer, employee, or agent responsible for administering the law under which the amount is payable shall agree on the time a payment is due, and that agreed upon time shall be one of the following times:

(1) If a law, including an administrative rule, of this state prescribes the time a payment is required to be made or reported, when the payment is required by that law to be paid or reported.

(2) If the payment is for services rendered, when the rendering of the services is completed.

(3) If the payment is reimbursement for a loss, when the loss is incurred.

(4) In the case of a fine or penalty for which a law or administrative rule does not prescribe a time for payment, when the fine or penalty is first assessed.

(5) If the payment arises from a legal finding, judgment, or adjudication order, when the finding, judgment, or order is rendered or issued.

(6) If the payment arises from an overpayment of money by the state to another person, when the overpayment is discovered.

(7) The date on which the amount for which an individual is personally liable under section 5735.35, section 5739.33, or division (G) of section 5747.07 of the Revised Code is determined.

(8) Upon proof of claim being filed in a bankruptcy case.

(9) Any other appropriate time determined by the attorney general and the officer, employee, or agent responsible for administering the law under which the amount is payable on the basis of statutory requirements or ordinary business processes of the state agency to which the payment is owed.

(B)(1) The attorney general shall give immediate notice by mail or otherwise to the party indebted of the nature and amount of the indebtedness.

(2) If the amount payable to this state arises from a tax levied under Chapter 5733., 5739., 5741., 5747., or 5751. of the Revised Code, the notice also shall specify all of the following:

(a) The assessment or case number;

(b) The tax pursuant to which the assessment is made;

(c) The reason for the liability, including, if applicable, that a penalty or interest is due;

(d) An explanation of how and when interest will be added to the amount assessed;

(e) That the attorney general and tax commissioner, acting together, have the authority, but are not required, to compromise the claim and accept payment over a reasonable time, if such actions are in the best interest of the state.

(C) The attorney general shall collect the claim or secure a judgment and issue an execution for its col-

lection.

(D) Each claim shall bear interest, from the day on which the claim became due, at the rate per annum required by section 5703.47 of the Revised Code.

(E) The attorney general and the chief officer of the agency reporting a claim, acting together, may do any of the following if such action is in the best interests of the state:

(1) Compromise the claim;

(2) Extend for a reasonable period the time for payment of the claim by agreeing to accept monthly or other periodic payments. The agreement may require security for payment of the claim.

(3) Add fees to recover the cost of processing checks or other draft instruments returned for insufficient funds and the cost of providing electronic payment options.

(F)(1) Except as provided in division (F)(2) of this section, if the attorney general finds, after investigation, that any claim due and owing to the state is uncollectible, the attorney general, with the consent of the chief officer of the agency reporting the claim, may do the following:

(a) Sell, convey, or otherwise transfer the claim to one or more private entities for collection;

(b) Cancel the claim or cause it to be canceled.

(2) The attorney general shall cancel or cause to be canceled an unsatisfied claim on the date that is forty years after the date the claim is certified.

(3) No initial action shall be commenced to collect any tax payable to the state that is administered by the tax commissioner, whether or not such tax is subject to division (B) of this section, or any penalty, interest, or additional charge on such tax, after the expiration of the period ending on the later of the dates specified in divisions (F)(3)(a) and (b) of this section, provided that such period shall be extended by the period of any stay to such collection or by any other period to which the parties mutually agree. If the initial action in aid of execution is commenced before the later of the dates specified in divisions (F)(3)(a) and (b) of this section, any and all subsequent actions may be pursued in aid of execution of judgment for as long as the debt exists.

(a) Seven years after the assessment of the tax, penalty, interest, or additional charge is issued.

(b) Four years after the assessment of the tax, penalty, interest, or additional charge becomes final. For the purposes of division (F)(3)(b) of this section, the assessment becomes final at the latest of the following: upon expiration of the period to petition for reassessment, or if applicable, to appeal a final determination of the commissioner or decision of the board of tax appeals or a court, or, if applicable, upon decision of the United States supreme court.

For the purposes of division (F)(3) of this section, an initial action to collect a tax debt is commenced at the time when any action, including any action in aid of execution on a judgment, commences after a certified copy of the tax commissioner's entry making an assessment final has been filed in the office of the clerk of court of common pleas in the county in which

the taxpayer resides or has its principal place of business in this state, or in the office of the clerk of court of common pleas of Franklin county, as provided in section 5739.13, 5741.14, 5747.13, or 5751.09 of the Revised Code or in any other applicable law requiring such a filing. If an assessment has not been issued and there is no time limitation on the issuance of an assessment under applicable law, an action to collect a tax debt commences when the action is filed in the courts of this state to collect the liability.

(4) If information contained in a claim that is sold, conveyed, or transferred to a private entity pursuant to this section is confidential pursuant to federal law or a section of the Revised Code that implements a federal law governing confidentiality, such information remains subject to that law during and following the sale, conveyance, or transfer.